reason | 1.03
Free Minds and Free Markets

Courting Stupidity
Why smart lawyers pick dumb jurors

Should We Invade Iraq?
John Mueller vs. Brink Lindsey on pre-emptive war

Tears of a Clown
Michael Moore and the impotence of leftist politics

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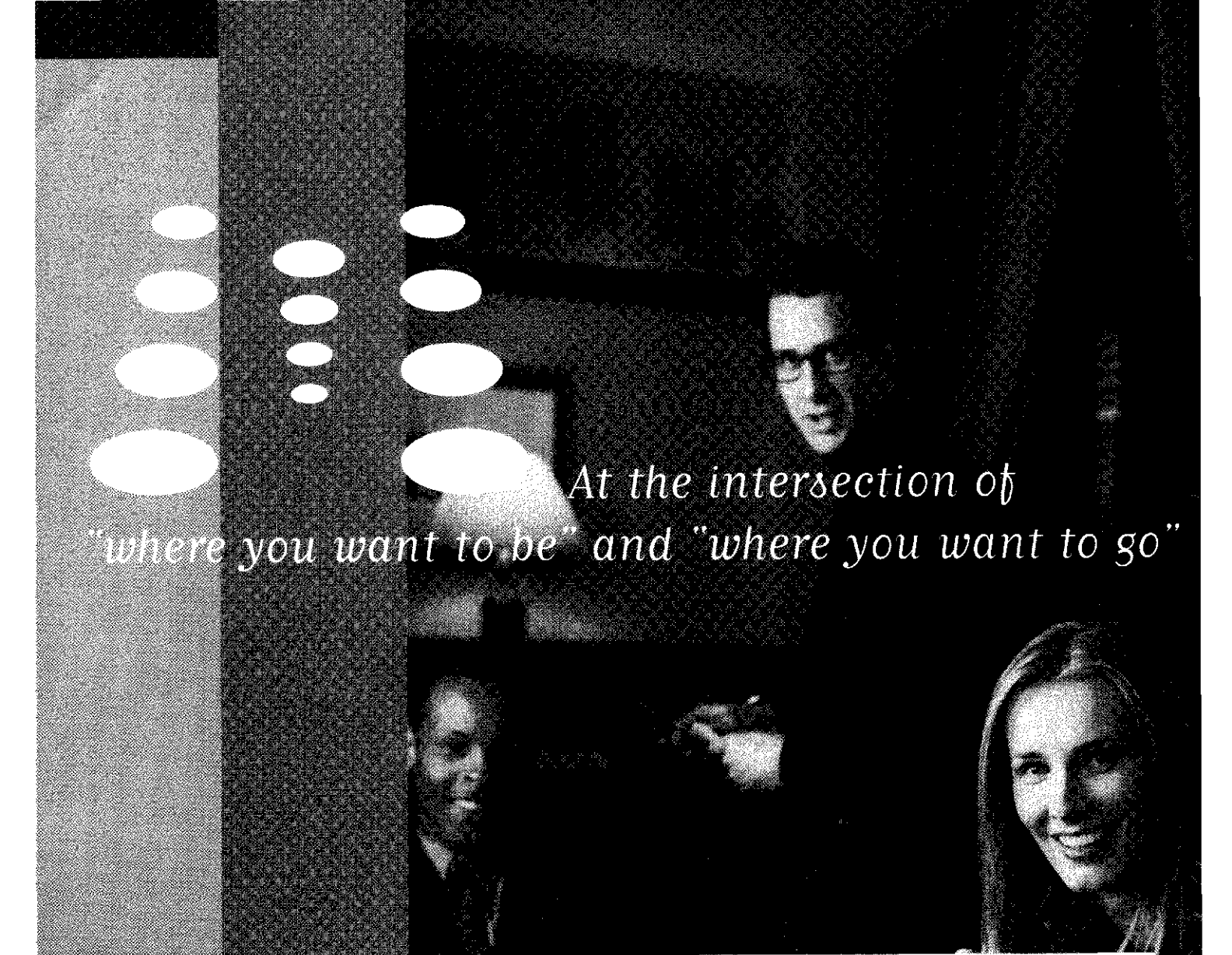

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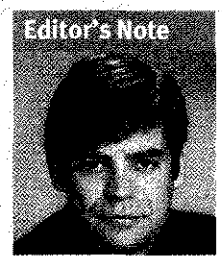

Jury Nullification

I WAS DISMISSED from the only jury on which I've ever been seated.

To be fair, I asked for it. I was in my early 20s, and the case was about a fender bender on that greatest of all roads, the New Jersey Turnpike. (It is great, some natives joke, because it lets you get out of the Garden State quickly and at a bargain price.) After the jury had been selected and sworn in, the judge turned to us and said, "This is going to take about a week. When it comes time for you to deliberate, you have to agree to apply the law as I define it. If I tell you that black is white, or that wrong is right, that's what you have to believe in reaching your decision."

We dutifully mumbled in agreement and went home for the day. Then I started thinking about what the judge had told us. It wasn't the threat of spending a week listening to the nuances of a wreck that bothered me. There are worse places to kill a few days than a courtroom, especially if you're not the one on trial and if you're working a crummy, low-paying job like the one I had at the time. It was the other thing the judge had said that put me on edge, the stuff about black being white and wrong being right.

The next morning I interrupted the judge as he started the trial and handed him a note that I'd typed up the night before. It laid out my discomfort with his insistence that jurors should put aside their personal morality in rendering a verdict. I just couldn't do that, I wrote. It just didn't seem right. There I was—the Antigone of auto accidents!—taking my principled stand in a county courtroom.

The judge was plainly annoyed when I approached the bench. As he read my note, I saw his face turn red from a mix of anger and frustration. He looked up at me, glaring with utter contempt, the likes of which I hope never again to have directed my way in a court of law, especially as a defendant. "What in hell is wrong with you?" he asked rhetorically before balling my note up in his hand and waving me away. "Get out of here already!"

I was perhaps guilty of thinking too much (that, and youthful exuberance). Longtime Contributing Editor Walter K. Olson's brilliant cover story, "Courting Stupidity" (page 22), exposes how plaintiffs' attorneys routinely seek out jurors who think too little. The motive is plain enough: Trial lawyers dream of scoring a "runaway verdict" in which a sympathetic jury will award a massive amount of cash.

Olson, author of the important new book *The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law* (St. Martin's), argues that such machinations do more than generate scandalous miscarriages of justice and shocking headlines. By inverting "the once widely held premise that the courts should draw on jurors who are civically engaged and aware of the events of the day," current trends in jury selection undermine one of the great institutions of our legal system. In a society as litigious as ours, that's nothing less than a national outrage.

Nick Gillespie

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Walter K. Olson

Dayn Perry

Jackson Kuhl

Attorneys select jurors for their stupidity, not their impartiality, argues Contributing Editor WALTER K. OLSON in "The Art of the Runaway Jury" (page 22). Fortunately for his intellectual reputation, Olson, a Manhattan Institute research fellow, hasn't yet been selected to serve. In fact, his work—which includes the just-released *The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law*, *The Excuse Factory* (1997), and *The Litigation Explosion* (1991)—has gotten someone else excused from jury duty. "Two friends took my books to the courthouse," Olson explains. "For one it actually worked; he was dismissed." Since 1999 Olson has also tracked legal idiocies on his popular Web site, Overlawyered.com.

In "Pumped-Up Hysteria" (page 32), sportswriter DAYN PERRY wonders whether steroid use by baseball players merits such a fuss. A Mississippi native who now lives in Austin, Texas, Perry did some weightlifting in high school and college. But his interest in steroid hype has more to do with fellow sportswriters than with sports itself. "I'm interested in how the mainstream sports media tend to distort issues," he says, "steroids being just one example." Perry also serves as a talent consultant for a major league baseball team—one that shall remain nameless. "They don't like to admit they use consultants to help pick players," he says.

"I usually get my coffee in Dunkin' Donuts or local shops," confesses JACKSON KUHL, who nevertheless defends the mega-chain Starbucks in "Tempest in a Coffeepot" (page 55). "I'm amazed that many people who complain about 'corporate' coffee are also the ones who buy it." Kuhl sounds like someone who could use a good, strong cup. The former senior producer at FoxNews.com is now a freelance writer, an archeology grad student at Yale, and an at-home dad to a 6-month-old son. Kuhl and family live in Fairfield, Connecticut—about five minutes from the nearest Starbucks.

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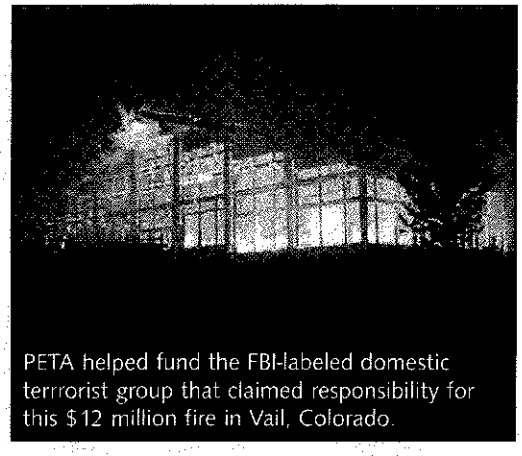
How do you define:

Life, Liberty and the Pursuit of Happiness?

One definition might include words like freedom and choice. Your's may use independence. There are organizations and activists trying to trample those concepts of freedom. They are looking to take away your choice to eat what you would like for dinner or make decisions on what foods you could provide to your children. Some of these groups don't hesitate to use junk science, lies, or even violence to persuade others that they are right.



PETA helped fund the FBI-labeled domestic terrrorist group that claimed responsibility for this $12 million fire in Vail, Colorado.

Self-appointed "food cops" are trying to prevent the distribution of genetically improved corn in African countries faced with starving populations. And hungry lawyers have already filed suits against restaurants, blaming them for their customers' obesity.

Radical animal-rights activists like the People for the Ethical Treatment of Animals have advocated blowing up laboratories that do medical research and the banks that fund them. They even helped fund the North American Earth Liberation Front, the FBI-labeled domestic terrorist group that claimed responsibility for this $12 million fire in Vail, Colorado.

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History Lesson

Nick Gillespie writes, "The system that delivers greater material wealth and greater personal freedom will triumph" ("Life After 9/11," October). That statement ignores history. Rome would still be an empire, and there would have been no Middle Ages. The Mongols would never have prevailed in China, and certainly there never would have been pyramids of skulls stacked by Tamarlane's troops around old Baghdad. Nor would there have been Mogul rulers in India.

Matt Ryan
Bremerton, WA

Nick Gillespie replies: I wouldn't go overboard in attributing too much personal freedom or material wealth to Rome and the others Matt Ryan mentions; these were societies in which a few people enjoyed virtually all of whatever political and economic privileges existed. Such inequality still describes too much of the Islamic world, in marked contrast to the modern West, in which civil liberties and high standards of living are widespread.

You Go, Girl

Cathy Seipp's "You've Lost Your Way, Baby" (October) is exceptional. As a man and a feminist, I find Seipp brings candor, clarity, and responsibility to the dreadful plight of contemporary feminism. Progress has been made, but equality is still lacking. The movement has rutted itself on trivial issues, or, worse, as Seipp eloquently argues, put other issues before their own, as in the case of the mighty O.J. Simpson.

Nathan P. Blouin
Boston, MA

I take Seipp's fundamental conclusion to be that leftist feminists who equate the U.S. war against the Taliban with neocolonial imperialism need to take stock of their values and get a grip. I agree, but I wonder if there isn't more to this gender story.

Among the heroes of Flight 93 was Mark Bingham, an openly gay man (for whom residents of the Castro in San Francisco have recently renamed one of the neighborhood gyms, incidentally). Was he one of the "manly men" applauded by conservatives? Why hasn't his name enjoyed the widespread recognition of Todd "Let's Roll" Beamer? Why has 9/11 resulted in a reassertion of "traditional" gender roles?

An alternative view of the gender dynamics of 9/11 might go something like this: Sure, there are a few wacky leftist feminists out there, but the majority of socially liberal Americans embraced the flag quite deeply following 9/11. It became "acceptable" for Democrats, Greens, liberals, gays, women, and others to celebrate the flag in a way unseen for over 30 years—for some, never before. The social left had an opportunity to shape the narrative of this event, to show that social progress for women is a defining characteristic in American society, in contradistinction to the societies of the Taliban and Saudi Arabia.

But political entrepreneurs on the right (read: socially conservative Christians) have hijacked (pardon the pun) the cultural imagery of September 11 to promote an atavistic social vision of "manly men" and of women who shouldn't complain too loudly—they don't have to wear burqas, after all. While the objective facts of the 9/11 tableau include gay Mark Bingham and female Condi Rice, conservatives have whitewashed the narrative of its gay and female characteristics. Pace Ann Coulter, the right, using the bully pulpit

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and the literal Christian pulpit, plays a large role in defining the terrain of the culture wars, especially in times of war and crisis. And it has used 9/11 as an opportunity to promote their familiar ideal, the 1950s nuclear family with defined gender roles and identities.

In other words, I think the real story is the inability of the moderate, socially liberal left to define the gender narrative of 9/11. People should be up in arms that the radical-minority left—i.e., Noam Chomsky, Susan Sontag, et al.—have been allowed to serve as the voice of anyone to the left of George W. Bush. A real political discourse on these issues would require a more, well, *representative* representative from the left.

J. P. Gownder
Boston, MA

Coulter Club

The thing that bothers me about Sara Rimensnyder ("Bitch Goddess," October) and others who are intimidated by Ann Coulter is that they always take the things she says out of context.

For example: "We should invade their countries, kill their leaders and convert them to Christianity." The ignorant and leftists—who are generally one and the same—would assume that Ann is a freak maniac who wants to kill, kill, kill. Rimensnyder knows damned well why she said it and to whom she was referring. Why did she not mention that?

And even though she doesn't crucify Coulter like the folks on the left who are the recipients of her merciless truth, Rimensnyder does tend to send a message that Ann is a little crazy, which we know is not so.

I attribute a lot of the attacks on Ann to people who are not used to being beaten over the head with her comedic honesty, not to mention jealousy of her success. Screw 'em.

I do have to say that Rimensnyder's line, "Indeed, her eyes fairly dance when she's challenged—though somewhat maniacally, as if she were reaching for her machete," cracked me up. I still have tears in my eyes picturing it.

Neil A. Runyon
Katy, TX

Thanks for the wonderful piece on Ann Coulter. It is no part of a satire to ask searching questions about a subject, of course, but it would sure be interesting to know what happened to Coulter in the last year. Perhaps it is a case of easy fame and fortune corrupting what was once an able and interesting writer.

For Coulter does have brains. I do not know where she finished in her law school class at Michigan, but it must have been high to obtain a federal clerkship. Her campaign tormenting Bill Clinton over the Paula Jones matter was a masterpiece of legal strategy. Her use of the 19th-century Hayes-Tilden election laws was brilliantly conceived and almost became the basis of the Supreme Court's opinion in *Bush v. Gore*. Prior to the *National Review* affair, her articles for *Human Events* were lengthy and sporadically insightful rambles about everything from the nature of reality to why she couldn't get a decent date.

Then her articles dropped to one short, well-edited but sterile rant per week, her television interviews became ever more confrontational and superficial, and she merged almost completely into her telebimbo persona.

Maybe if her book stops selling or she develops a bad case of acne, she could be persuaded to give up her day job as a stand-up comic and go back to real writing and real thinking. It is probably hard to do that, though, when

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your shtick as a national dartboard figure is playing so well.
John Mack
New London, MN

The *ad hominem* attack on Ann Coulter in "Bitch Goddess" is so over the top and out of character with what I've come to expect from **reason** that I just have to wonder what's going on.

Rimensnyder obviously has personal issues with Coulter. She calls her a "hilariously shrill" TV pundit, an "inveterate nest fouler," and the "queen" of "the kingdom of snark." Her "large floating head" (displayed in the accompanying photo) seems "designed to double as a dartboard." Wow!

Was this supposed to qualify as a book review? I can't tell because it's so "hilariously shrill."
Jon A. Longerbone
Laguna Niguel, CA

Coulter's post-9/11 "infamous foreign policy suggestion" would have been infamous if it were a policy suggestion, but of course it was no such thing. Coulter frequently makes her point using rhetorical exaggeration. She's a writer to take seriously but not always literally. The same can be said of H.L. Mencken, Thomas Wolfe, and even Molly Ivins on the other side of the fence. When H.L. Mencken recommended that civilization send missionaries to "Darkest Arkansas," was that a "domestic policy suggestion"?

Look at it this way: I suppose it's possible that Ann Coulter was earnestly advancing a proposal to simultaneously invade 20 nations and then present the entire Muslim world with the choice of the cross or the sword. But somehow I doubt it.

It seems, rather, just barely possible that the fault lies in your reviewer's flat, literal reading of Coulter. The reasonable conclusion is not that Ann Coulter is an infamous warmonger but that Sara Rimensnyder is (at least in this instance) a "tone-deaf" reader.

Finally, does your assistant editor really think Coulter's book sales depend primarily on those who "have the pleasure of hating her"? I and many others bought and read *Slander* because we love Ann Coulter. And we love her because she smites the Philistines, hip and thigh.
Steve Smith
Kirksville, MO

Sara Rimensnyder replies: Whether you like Ann Coulter and her inflammatory M.O. is largely a matter of taste and, to some degree, politics. But that wasn't the focus of my article, which was not a review of *Slander.* I wanted to dissect (and yes, lampoon) the spectacle Coulter so successfully creates with her bomb-throwing rhetorical style. It thrills her fans *and* her opponents—all the while bringing out their worst.

Tongue in cheek, I suggested that Coulter's worst enemies are the ones who keep her book atop the bestseller list. This was intended to illustrate my belief that people who dislike her may get the most pleasure of all from her performance. As I said in the piece, everybody loves a straw man to make them feel better, smarter, and righter—whether or not they actually buy her book.

To Steve Smith and others who were irritated that I don't get Coulter's jokes, believe me, I empathize.

reason news
We're happy to announce that **reason** is a finalist in the political coverage category of the Utne Independent Press Awards. Winners will be announced in early 2003.

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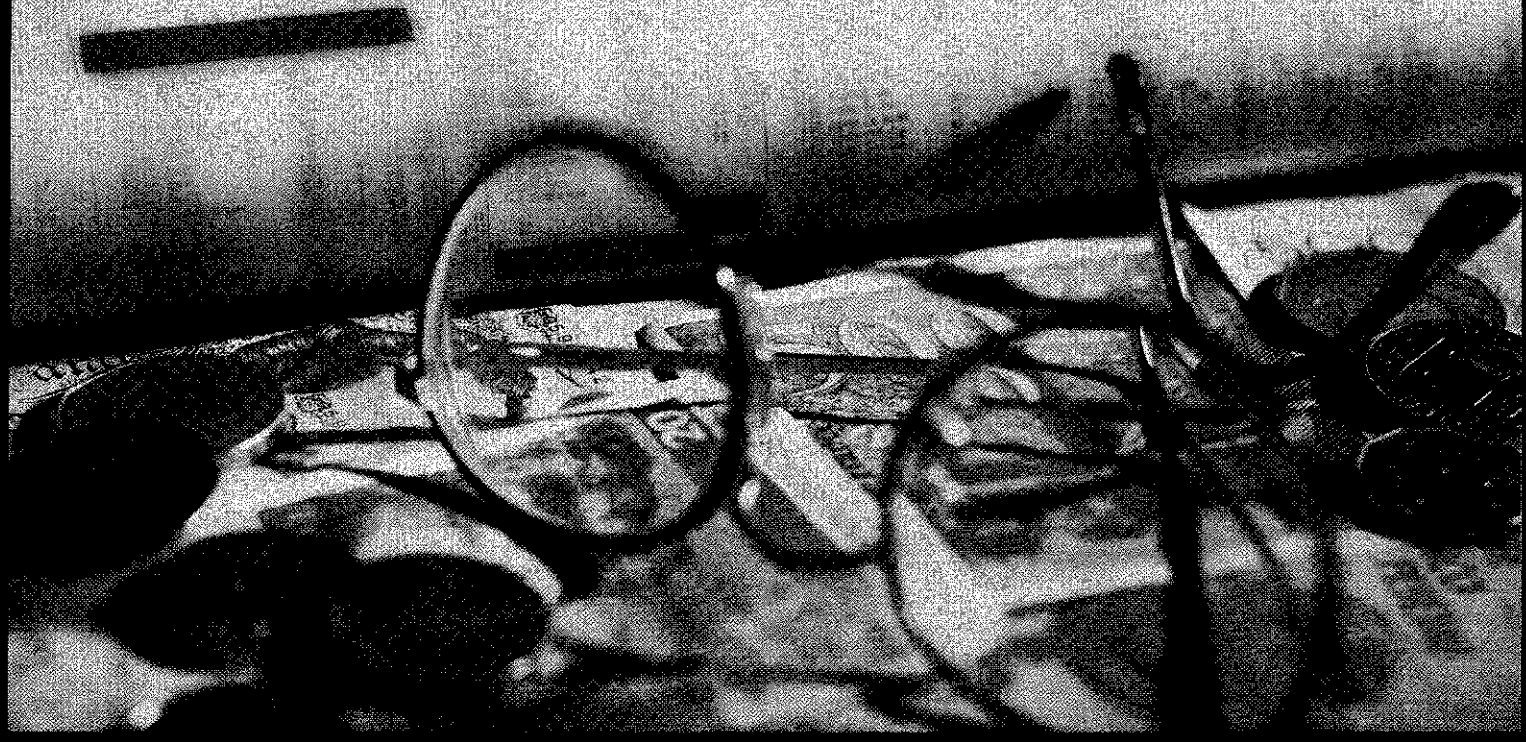

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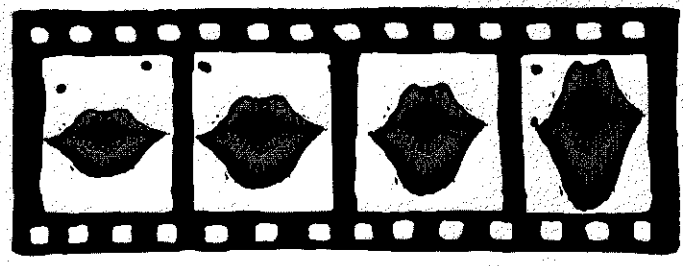
Moving for social change; *The New York Times*' critical defect; Swedish voucher success; the day idealism died; big spending guys; safety for profit; and skipping towards Gomorrah

The crusade against hotel porn

Blue Blockers

Jacob Sullum

FOR A GUY who hates pornography, Phil Burress seems to know an awful lot about it. In a September 24 story about his campaign to eliminate "adult" movies from hotels across America, *USA Today* reported: "Hotel room pay-per-view offerings have become more graphic in recent years, showing close-ups of all manner of sex acts, Burress says."



Apparently, keeping up with the latest porn offerings at local hotels is part of Burress' job as president of the Cincinnati-based Citizens for Community Values (CCV). Last summer three hotels in the Cincinnati area—a Travelodge and a Comfort Suites in Newport, Kentucky, and a Marriott in Mason, Ohio—pulled their X-rated fare after Burress' group convinced local prosecutors to threaten them with obscenity charges. Now CCV and other anti-porn groups want the U.S. Justice Department to intimidate hotels across the country into following suit.

It's not clear that prosecutors would win such cases, even in Cincinnati. In 2001 Elyse Metcalf, the owner of a Cincinnati store that sells porn videos, was acquitted of obscenity charges, despite the city's reputedly conservative community standards. Last fall, on the other hand, a jury in the same county convicted Jennifer Dute, who offered porn videos starring herself for sale online, of pandering obscenity. Unlike Metcalf and Dute, few hotels will be willing to risk the negative publicity of a trial. As is often true with attempts to limit the availability of sexually explicit material, the hassle factor may be more important than the legal merits.

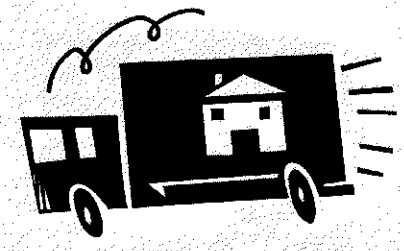
"We're going to put on a full-court press," Burress told *USA Today*, "to educate people that hotels are distributing hard-core pornography." The secret may be out. According to Cabil Corp., which provides billing services for in-room entertainment, porn typically accounts for 50 percent or more of a hotel's pay-per-view sales, bringing in something like half a billion dollars a year in the U.S. ▮

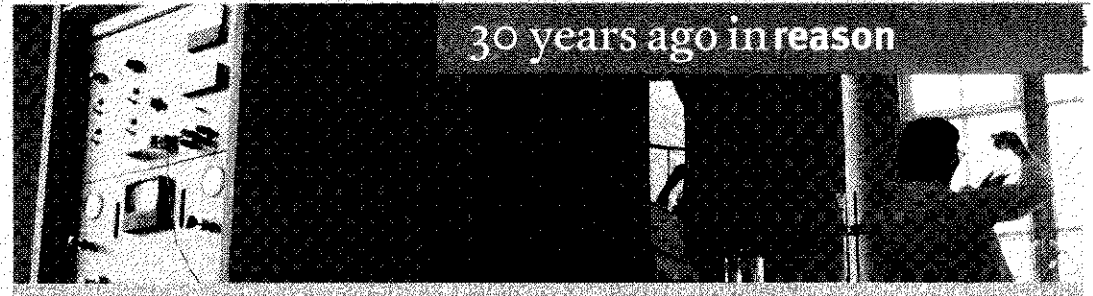
Moving for social change

Operation Free State

Jesse Walker

IF YOU'D LIKE to put some political ideas into practice, you've got several options. One is to convince your neighbors to vote your notions into law. Another is to find some like-minded ideo-





30 years ago in reason

"The John Birch Society has abandoned its old conspiracy theory, which held that the liberal establishment is riddled with Soviet agents....Their 'new' theory holds that international communism was created by a small clique of international and 'Wall Street' financiers."

—Peter E. McAlpine, "The Eastern Establishment 'Conspiracy'"

"Intellectuals in the humanities have long attacked science....The average college English professor lives with the unadmitted fear of exposure as an intellectual fraud—and the man most likely to expose him is the scientist, the real intellectual."

—Ronald E. Merrill, "The New Anti-Science Movement"

"Unless Congress acts decisively to remove existing controls...the government will take over radio and television in a few years. The result would be a single broadcast system, 'operated, programmed—in short, completely dominated—by an elite group of Washington bureaucrats.'"

—Trends, "Freedom from Broadcasting"

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logues and start a new community from scratch.

And then there's Jason Sorens' plan, which combines the first two approaches: Find people who agree with you, move en masse to a designated place, and *then* start voting. Sorens, a libertarian graduate student at Yale, is the founder of the Free State Project.

"Our research so far," the project's Web site declares, "indicates that 20,000 activists could heavily influence only states with under about 1.5 million population, or which spend less than $10 million on political campaigns in any given two-year election cycle." Once other considerations—"coastal access," "a decent job market," "a native culture that's already pro-liberty"—are taken into account, Sorens says, four potential targets stand out: Delaware, New Hampshire, Wyoming, and Alaska.

Sorens' idea is not new to libertarian circles. In the late 1980s, for example, the Colorado activist Mary Margaret Glennie launched the Fort Collins Project, described in the now-defunct *American Libertarian* as "a five-year project to attract an initial one thousand libertarians to the Fort Collins area." (The effort failed, and Glennie later turned her attention to the prospect of libertarian space colonies.)

Sorens believes his group is taking a more scientific approach. The Fort Collins group, he notes, "didn't research alternative options"; Glennie picked Fort Collins because that's where she lived. In addition, Sorens will ask his supporters to make the move only after 20,000 people have signed on. That way, he hopes, no one will have to uproot himself without knowing whether others will follow.

Has anyone ever succeeded in taking over a community this way? In 1981 the guru Bhagwan Shree Rajneesh and his followers moved to the Big Muddy Ranch near Antelope, Oregon, with plans to transform their commune into an enormous resort. When the local government started giving them trouble, they registered to vote, took over the city council, and renamed Antelope the City of Rajneesh. Alas: The group was later charged with a series of crimes, including vote fraud, and its guru was deported. Today, Antelope is once more known by its original name.

Then there's the followers of the Maharishi Mahesh Yogi, who settled in Fairfield, Iowa, in 1974. On July 25, 2001, they incorporated a new town nearby, dubbed Vedic City, which they have since declared the capital of a new Global Country of World Peace. Four months after Vedic City was born, a member of the Maharishi-linked Natural Law Party was elected mayor of Fairfield.

Sorens thinks the Free State Project can do better. "We have an advantage," he argues, "in that we aren't a fringe religious group."

Florida caseworkers lose kids

Child Careless

Brian Doherty

FLORIDA'S CHILD WELFARE system has sported a black eye since it finally admitted last April that 5-year-old Rilya Wilson, allegedly under its supervision, was missing. It turned out the caseworkers hadn't done their monthly check-ins on Rilya for 15 months. Now the *Sun-Sentinel*, a regional paper in South Florida, has added a bloody nose with an investigation proving that reporters can do in a few hours what Florida's Department of Children and Families (DCF) can't do at all.

In August the paper picked 24 children from the state's official list of missing kids ostensibly under the DCF's care, most of them under age 4. The reporters located two of them in less than three hours and within a month had found seven more. They did this without access to any DCF files, merely using public records and calling relatives. Four missing brothers were found playing in a city football league in a neighborhood a mile from a DCF office.

DCF policy says that a caseworker who finds that a child is missing should immediately notify police and the state's missing children center, and get a court order authorizing law enforcement to take the kid into custody if he's found. The *Sun-Sentinel* found that in 20 of the 24 cases they examined, DCF took at least a month to notify the cops. In six of those cases, the wait was over four years.

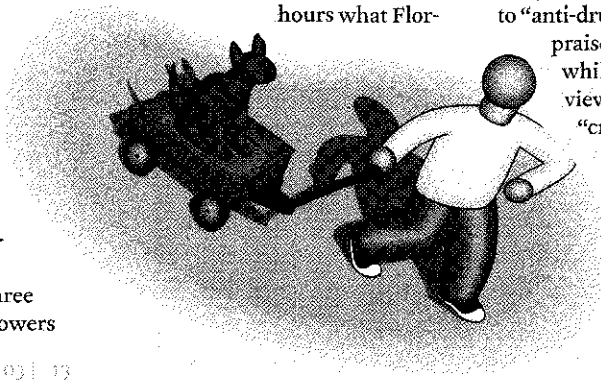
The New York Times just says no

Critical Defect

Jacob Sullum

"THE BASIC ETHIC of news reporting," explains a booklet produced by the *New York Times* Newspaper in Education Program, is to "convey reliable information from trustworthy sources, present the information objectively, and acknowledge both sides of an issue." The booklet then proceeds to violate every one of those principles.

In *Focus on Marijuana*, a new lesson guide for middle and high school teachers, the Gray Lady lends her venerable name to "anti-drug education" that praises evenhandedness while ignoring contrary viewpoints and teaches "critical thinking skills" by passing along propaganda. The 85-page booklet, produced in cooperation with the Office of National Drug Control Pol-



Quotes

"I wanted to write an opera about a woman who loves and could be loved."

—Russian composer Vitali Okorokov in the October 10 *Andante*, commenting on his new opera, in which the CIA sends Monica Lewinsky to Russia to woo its president

"What have we gotten from the Bush presidency? A complete climbdown on the domestic front, frightening innovations in the domestic war on terror, and a foreign policy guaranteed to keep us hugging the Middle East tar baby for generations to come. Oh yeah, and 300 bucks."

—Gene Healy on genehealy.com, October 1

Source

You can watch *Enduring Freedom: The Opening Chapter*, the first military propaganda film to have played in American theaters since World War II, at video.marinecorps.com/. The 5-minute, $1.2 million short was co-produced by the Navy and Marines, and is devoted almost entirely to personalizing American military personnel. The Tennessee-based Regal Entertainment Group, the nation's biggest chain, ran the short on 800 of its screens from mid-September through mid-October.

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Brickbats

Ralph Gerdelan, executive director of New Zealand's Problem Gambling Foundation, is under investigation for running up a NZ$281,000 bill on the foundation's credit card in the last year. That included NZ$18,000 in cash advances from money machines. When asked if he'd used any of the money for gambling, Gerdelan refused to comment. The foundation, which is funded by fees paid by the gaming industry, treats problem gamblers. It does not prohibit its staff from gambling.

Police in Auburn, Maine, have been ripping up signs from people's yards. The city bans any political signs on private property until 30 days before an election. "It's designed to protect people from having to look at, say, my 20 signs on my lawn all year long," Auburn City Clerk Mary Lou Magno said.

Shawn B. McCullers, a federal air marshal accused of holding passengers at gunpoint and arresting a man for "observing too closely," had been rejected by the Philadelphia Police Department in the mid-1990s after failing a psychological test. He received just two weeks' training before being put to work.

A poll of Iranians has revealed that 74 percent of those over 15 want the nation to engage in talks with the United States and 46 percent believe Washington's policy toward their government is "to some extent correct." How did the government react? The religious judiciary jailed the heads of the state polling agency, which conducted the survey, and the state news agency, which published it. They are charged with "publishing lies to excite public opinion." No action has been taken against parliament, which commissioned the poll.

Sandy Cohen, 85, had just finished taking a shower when Philadelphia police started knocking on her door, clutching a search warrant for drugs. She reached the door just as an explosive device they had planted blew it off its hinges. A SWAT team burst in, pointing their guns at her. Raising her arms, she told them they had the wrong house. One cop simply snarled, "That's what they all say." But after checking the house out, the cops found they had indeed got the wrong one, something neighbors had tried to tell them as they planted the explosives.

The police in Sunnmore, Finland, claimed it was the largest amphetamine bust of the year. Prosecutors and a judge believed them, holding in jail the 27-year-old man found with the white powder while police pursued his suppliers. But when the cops finally got around to testing the substance, it turned out to be wheat flour. An exasperated judge asked the police why they hadn't "tasted" the powder to confirm it was drugs before tossing the man in jail. The police said that was done only in movies.

The Bureau of Land Management office in Prineveille, Oregon, was closed for three days after several employees who complained about strange vapors were taken to the hospital. An investigation found the odor was apparently someone's Mexican food.

Charles Oliver

icy, exemplifies the current vogue in "substance prevention," which eschews "didactic approaches or scare tactics" in favor of "interactive teaching techniques." The lesson plans are full of questions, but there is still only one right answer.

Students may have some questions of their own. According to Lesson 1, for example, it's a "myth" that "marijuana is not addictive." Yet a *New York Times* article in Lesson 4 refers to "the debate over whether marijuana is...habit-forming." Lesson 1, which suggests that it's reckless to try marijuana because some people use it to excess, notes in passing that the same could be said of alcohol. Lesson 5, ostensibly about the dangers of smoking marijuana, focuses mainly on tobacco. Similarly, Lesson 7 is supposed to be about "drugged driving," but almost all the data it presents deal with alcohol.

Along with the contradictions and non sequiturs, there are plenty of questionable claims. An article by a physician asserts that "marijuana today is anywhere from 10 to 20 times as potent as what was passed around at Woodstock." The lesson guide says it's a "myth" that "marijuana makes you feel relaxed and laid back," suggesting that pot smokers are just as likely to be become "enraged" and aggressive.

Focus on Marijuana urges teachers to "impress upon students the importance of evaluating information for themselves and finding trustworthy sources of information." The lessons may well accomplish that goal, but probably not in the way *The New York Times* intended.

School choice in Sweden

Vouching for Vouchers

Brian Doherty

A NEW STUDY by two Swedish economists examines whether the Swedish voucher program has hurt education in public schools.

Yes, that's right: Sweden, that vaunted social democratic paradise, operates the world's most robust and wide-ranging voucher program. Since 1992 the Swedish government has offered parents up to 75 percent of the per-student cost of their local public school. The money can go to any private school—nonprofit, for-profit, or religious—as long as the national education bureaucracy approves it. The approval requirement is mostly to ensure that private schools are open to all kids and don't charge tuition above the voucher. Parents can also choose among many public schools for their kids, unlike in the U.S., where kids generally have to attend their district school.

So has the Swedish voucher program skimmed the cream, leaving public schools with the dregs, as many U.S. voucher critics predict?

"The present study shows this fear to be without foundation," conclude its authors, F. Mikael Sandstrom and Fredrik Bergstrom of the Stockholm-based Research Institute of Industrial Economics. "We find that the extent of competition

from independent schools, measured as the proportion of students in the municipality that goes to independent schools, improves both the test results and the grades in public schools. ...The improvement is significant both in statistical and real terms."

Fed up with soup kitchens

The Day Idealism Died

Sara Rimensnyder

IT'S A SAD irony: Santa Monica, California, which has long been one of the nation's most compassionate cities, has passed an ordinance that restricts feeding programs for the hungry.

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Balance Sheet

Jeff A. Taylor

Stock Stuffer

A market finds value in previously worthless Enron and WorldCom shares. Not the stock market, though. Collectors pay $40 a pop for the notorious pieces of paper.

Clear Code

A U.S. district court judge jettisons nine states' attempt to bust up Microsoft's antitrust pact with the Justice Department. The entire software sector can now fire their lawyers and get back to writing code.

Language Gap

The U.S. Court of Appeals for the 9th Circuit says California's Proposition 227 does not discriminate against non-English speakers. The voter-approved ban on bilingual education in public schools was motivated not by racial concerns but by legitimate worries that schools were failing to help kids, decides the court.

Bacteria Bonus

Researchers at Purdue University and the University of British Columbia announce they're getting closer to neutralizing PCBs, dangerous environmental contaminants sometimes found in fish. The team is experimenting on bacteria, trying to get it to digest PCBs the way they do other compounds.

Bad Medicine

A federal court rules the Food and Drug Administration exceeded its authority in trying to police "off-label" pediatric uses of drugs. The FDA had ruled that drug companies had to test all their products for use on kids—even ones intended only for adults.

Site Plan

U.S. District Judge Patricia Seitz finds the Americans with Disabilities Act applies only to the real world, not to the Internet. A cottage industry had sprung up to help Web sites comply with the law.

Comic Genius

The Texas Court of Criminal Appeals refuses to hear the case of comic book hawker Jesus Castillo. The Dallas comic store manager was convicted in August 2000 of "display of obscenity" for selling *Demon Beast Invasion #2* to an adult and sentenced to 180 days in jail and a $4,000 fine.

Smoke Detectors

Tokyo's smokers have nowhere to hide. Entire downtown sectors are now officially smoke-free, and lighting up in the middle of the street carries a ¥20,000 ($164) fine.

Sucker Punch

The U.S. Department of Agriculture awards a $300,000 grant to help beer makers improve their quality control. Mocon Inc. will study how beer ingredients come together and apply microanalytics to brewski.

Wurst Worst

The German government refuses to renew the vending license for the only bratwurst stand at Berlin's historic Brandenburg gate. Outraged local wurst lovers suspect high-end restaurants lining the central square lobbied to kick the humble sausage out.

Pedal Power

Santa Barbara seeks to save its citizens from the terrible threat of...pedicabs. The city government orders FBI background checks, as well as business and driver's licenses, for all bike-taxi operators.

Times Passages

New York's quasi-governmental Empire State Development Corporation moves to condemn and tear down a group of busy Manhattan buildings, the better to make way for *New York Times* offices. The deal will result in below-market rents for the media giant, critics charge.

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Data

Hey, Big Spender

Brian Doherty

Usually, it's the federal government that takes most of the flak for taxing and spending. But the Cato Institute periodically gives state governments the evil eye, courtesy of its "Fiscal Policy Report Card on America's Governors." That's a good thing, since states spend a sizeable portion of every American's income—roughly 9 percent on average.

Cato's 2002 report card finds that, thanks to an explosion of state spending during the 1990s from $303 billion to $638 billion in current dollars, state governments overall spent $40 billion more than they took in last year.

It turns out that a politician's party affiliation doesn't predict his spending habits. Cato's analysts measured spending and taxation (both proposed and instituted, to help adjust for legislative power), then awarded scores based on the extent to which governors have cut both. Two of the most fiscally irresponsible governors were Republicans, and one of the most responsible was a Democrat.

Grading the Governors

Top Three		Bottom Three	
Bill Owens (R-Colorado)	A (76)*	Don Sundquist (R-Tennessee)	F (40)
Jeb Bush (R-Florida)	A (67)	Bob Taft (R-Ohio)	F (40)
Roy Barnes (D-Georgia)	B (64)	John Kitzhaber (D-Oregon)	F (30)

*Each number represents an average of scores based on 17 different taxing and spending variables, each ranked on a 100-point scale.

Source: Cato Institute, "Fiscal Policy Report Card on America's Governors: 2002," by Stephen Moore and Stephen Slivinski, available online at www.cato.org/pubs/pas/pa-454es.html.

For the homeless, Santa Monica has long been a sweet spot. Life without a roof may be mean, but in this beachside community at least you can rest your head in grass-lined parks with ocean views while taking advantage of an elaborate social services network. While other cities in the Los Angeles area spend pocket change on the homeless, Santa Monica annually spends nearly $20 per capita. Moreover, independent charity groups from nearby cities that don't have homeless problems come to Santa Monica to dole out free daily meals. The result is that the homeless population of 1,000-plus is growing faster than ever, as vagrants flood from all over the region to the closest thing to Club Med that abject poverty can offer.

And so we find that, even in Santa Monica, there are limits to compassion. "The homeless have made the city and its residents miserable," according to one man who appealed to the city council during a heated fall 2002 meeting. The council heard from angry shop clerks who were tired of cleaning up human excrement in their doorways, from residents who were afraid to go outside at night, from shoppers who resented the aggressive panhandling.

Though many stalwart defenders of the homeless also spoke at the meeting, the council ultimately passed two ordinances that appear intended to clear transients out. One bans camping in commercial doorways downtown, although business owners can exempt their properties. The second strictly regulates the dozens of independent free meal programs operating in area parks.

"One thing I'm sure of," said Council Member Robert Holbrook, who voted for both ordinances, "is that Santa Monica cannot solve the problem of national American homelessness." ◧

Traffic light cameras questioned

Safety for Profit

Sara Rimensnyder

MANY SPY-CAM critics have charged that traffic light cameras are geared toward ticket revenue more than safety. Now the leader of Washington, D.C., has admitted as much.

"The cameras are about safety and revenue," Mayor Anthony Williams told a local radio station last fall, explaining that the city was likely to finish the year with a $323 million deficit and needed to get creative. That apparently means expanding its camera program, which reeled in an impressive $18.4 million during its first year in operation.

The mayor's comments, as well as a particularly sneaky camera, have prompted the mid-Atlantic chapter of the American Automobile Association to withdraw support for the city's traffic cameras. "We are against using law enforcement for revenue making," says AAA spokesman Lon Anderson, "and we caught the city red-handed."

Anderson is referring to a camera placed at a flashing yel-

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low light at a parking lot exit from Union Station, D.C.'s train depot. The light turns immediately from flashing yellow to red,

and the camera there earned the city $1.5 million by catching 20,000 drivers. Anderson also has anecdotal evidence suggesting fender-benders at that light increased after the camera was installed.

After Anderson held a curbside press conference to denounce the Union Station camera, it was removed. But none of the $75 fines was refunded.

"We call that 21st century highway robbery," he says. "Jurisdictions that put these in have to do more than pay lip service to traffic safety."

The Bush administration defends Clinton

Pardon Me?

Brian Doherty

JUDICIAL WATCH, a gadfly legal organization founded by the colorful Larry Klayman, became famous for hounding former President Bill Clinton with lawsuit after lawsuit. Written off by Clintonistas as part of the vast right-wing conspiracy, Klayman and his group are now proving to be equal-opportunity burrs in the side of presidential authority. They haven't settled down just because their old foe is gone.

The Bush administration is fighting Judicial Watch's lawsuit to open records and documents held by the Justice Department relating to the 177 pardons Clinton executed on his very last day in office. The White House wants to keep those records closed, not so much to do Clinton a favor as to protect the current administration's right to impenetrable secrecy.

The Bush administration, like the one before it, has shown a general unwillingness to fork over papers, pulling down shades of privilege and secrecy whenever it can. The Clinton pardon papers aren't the only ones the Justice Department has protected: It is also refusing to open the 1927 pardon records of "Back to Africa" leader Marcus Garvey.

Presidents don't actually have to claim executive privilege to keep documents closed to the public. In the Judicial Watch case, Assistant Attorney General Robert D. McCallum has invoked "presidential communications privilege" to shield the documents. But according to Judicial Watch, no such privilege should apply to communications that aren't directly connected to the White House. Many of the documents relating to a pardon, such as attorney's memos, don't actually cross the president's desk.

Whatever the merits, it's unlikely that Judicial Watch will win its case, according to Paul Rosenzweig, a senior legal research fellow at the Heritage Foundation. Courts almost never overturn presidential claims to privilege in civil suits, he says. Though the Clinton administration did lose some executive privilege claims, they all involved criminal cases.

"The pardon power is pretty close to the core of executive privilege," says Rosenzweig. "It is an unreviewable decision by the president to exercise executive grace."

But it is that very finality, argues Judicial Watch President Tom Fitton, that makes greater transparency so vital.

Sin in Moderation

Sara Rimensnyder

Mark Van S.

Dan Savage

For 11 years, Dan Savage has written "Savage Love," a highly entertaining, wildly raunchy syndicated sex advice column. But it was his satirical claim that he tried to infect 2000 Republican presidential hopeful Gary Bauer with the flu—by secretly licking doorknobs, staplers, and other assorted supplies in the candidate's office—that put him on the national radar. (Savage's lawyer says the incident, described by Savage in *Salon*, never occurred. "That's my story," confirms Savage, "at least until the statute of limitations on doorknob licking runs out.")

These days Savage is haranguing social conservatives in a more traditional—but not necessarily more serious—fashion. His new book, *Skipping Towards Gomorrah: The Seven Deadly Sins and the Pursuit of Happiness in America* (Dutton), is a popular antidote to the dour doomsday genre epitomized by Robert Bork's 1997 jeremiad on moral decay, *Slouching Towards Gomorrah*. In *Skipping*, Savage journalistically sets out to join his countrymen in committing the seven deadly sins—for example, exploring lust by attending a national swingers convention. The editor of Seattle's alternative weekly *The Stranger*, Savage has published two other books: *Savage Love*, a collection of advice columns, and *The Kid*, a memoir about adopting his son.

Assistant Editor Sara Rimensnyder talked with Savage in November.

Q: You call yourself a "pro-sin American." What do you mean?

A: I don't mean that I'm pro-stupidity; I come out strongly for moderation and restraint. Pro-sin means I think we should have the freedom to explore vice.

Q: You don't seem very sinful in your book.

A: Hey, I'm sinful enough. In Bill Bennett's estimation I'm the worst of the worst: an occasionally dope-smoking fag.

Q: And how do *you* think you rate on the sin scale?

A: My life is emblematic of most people in America: I indulge in behavior Bork or Bennett wouldn't approve of. But I'm also an upstanding, taxpaying citizen, with a boyfriend and a baby.

Q: You write that even at Los Angeles' gay pride parade some of the participants justified their good time by saying it's "for the children." Why are Americans so afraid to admit to having fun?

A: Because Canada got the French and we got the Puritans.

Q: Whose doorknob is next on your list?

A: Actually, I think my next target will be the left and its reaction to the war on terrorism. I don't understand being more afraid of John Ashcroft than Osama bin Laden. Personally, I prefer Christian fundamentalists to Islamic fundamentalists.

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Man Trouble

What does male-on-male sexual harassment mean for discrimination law?

SIXTEEN YEARS AGO, the U.S. Supreme Court ruled in *Meritor v. Vinson* that sexual harassment violates the federal prohibition on sex discrimination in the workplace. Many feminists hailed the decision as a major victory for women. They probably did not imagine such legal developments as lawsuits by heterosexual men against other heterosexual men for sexual harassment via bawdy humor.

Yet the Supreme Court gave such cases the go-ahead in the 1998 decision *Oncale v. Sundowner Offshore Services*, and they seem to be the new frontier in sexual harassment litigation. By now the trend is prominent enough to have merited a *New York Times Magazine* cover story.

The behavior alleged (and sometimes documented) in these cases goes far beyond typical "guy" antics. At one food processing machinery plant, some of the men, including a supervisor, would goose co-workers by grabbing their crotches or pinching their buttocks or nipples, just to get a kick out of their startled reactions. At a Chevrolet dealership that could have come from a demented parody of a David Mamet play, a pair of managers routinely denigrated salesmen with sexual language and gestures. One would pretend to grab employees by the crotch, sometimes making contact.

But to be actionable under Title VII of the Civil Rights Act, workplace harassment must be more than crude or humiliating. It has to constitute discrimination on the basis of sex.

At first blush, the idea that male-on-male "hostile environment" harassment is a manifestation of anti-male bias or discrimination seems absurd. Indeed, judges were initially skeptical—just as they were, at first, of the doctrine that sexual advances by men toward women in the workplace are a form of sex discrimination. In the 1980s and '90s, state and federal courts took, as Justice Antonin Scalia noted in the *Oncale* opinion, "a bewildering variety of stances" on this issue: Some held that same-sex harassment claims were not actionable under any circumstances; others, that they were actionable if the harasser was gay and therefore motivated by sexual desire; still others, that they were actionable under any circumstances.

Oncale cut through this tangled web of conflicting opinions by proclaiming that statutory language did not support "a categorical rule excluding same-sex harassment claims from the coverage of Title VII" and that a male plaintiff could have a valid claim if he could show that he was subjected to disadvantageous conditions of employment because of his sex. The plaintiff in that case was a sympathetic figure: a slightly built man who endured nasty sexual taunts and physical assaults, including being held down and prodded in the buttocks with a soap bar, from his co-workers on an offshore oil rig. But the Supreme Court never did explain how his mistreatment could have put him at a disadvantage compared to female workers—which would have been a difficult case to make, since there were no female workers on the rig.

Some same-sex harassment decisions use amazingly convoluted logic to find anti-male discrimination. In one case, the court found that grabbing a man by the testicles was discriminatory because only men have testicles. Butt grabbing, presumably, would be legal.

The Supreme Court has yet to tackle another paradox of the discrimination-based model of sexual harassment law: What if the work environment is equally "hostile" for men and women? For some time, legal scholars invoked the dilemma of the "equal opportunity harasser"

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as a hypothetical paradox. Now it has surfaced in some real-life cases, including some discussed in the *New York Times Magazine* piece. A former Wal-Mart employee had his $80,000 damage award overturned in 2001 because the court of appeals ruled that his supervisor's "vulgar and offensive" conduct was not discriminatory: He was "obnoxious to men and women alike." In an earlier Indiana case, a boss who allegedly made sexual advances toward both a male and a female employee, and retaliated against them for not complying, was exonerated on similar grounds—which leads to the mind-boggling conclusion that bisexuals have a license to harass.

If that sounds crazy, maybe it's because the basic paradigm of sexual harassment as sex discrimination is deeply flawed. In fact, it's far from clear that this paradigm makes sense even when applied to the "classic" scenario of male-on-female harassment—as some feminist legal scholars are now acknowledging.

Sure, workplace ribaldry or unwanted sexual advances directed at women may sometimes be motivated by a desire to put women "in their place"—to humiliate them, terrorize them, even force them to quit. But sexual attraction may be a far more typical motive; much "harassment" is merely a clumsy attempt at flirting. Moreover, women's claims of "hostile environment" harassment are often based on a bawdy workplace atmosphere which seems to affect men and women alike, and to which other women may contribute. When such claims have succeeded, it has been on the rather sexist theoretical grounds that a sexualized work environment has a uniquely negative effect on women. Male-on-male harassment complaints undercut this already shaky logic.

In recent years, the current legal model of sexual harassment has been criticized by a number of legal scholars who identify strongly as feminists. In a much-discussed 1998 article in the *Yale Law Journal*, Yale law professor Vicki Schultz challenged what she calls the "sexual model" of sexual harassment as both too broad and too narrow: too narrow because it does not cover many nonsexual forms of gender-based harassment that may put women at a disadvantage on the job (such as sabotaging a woman's work project), too broad because it often seems to target all expressions of sexuality in the workplace.

Schultz would have the law focus on the discriminatory rather than sexual nature of harassment. While such a shift would have its merits—it would, at least, rule out the ludicrous cases in which people get fired for repeating a joke from *Seinfeld* at the office—it would create new problems, such as the possibility of ideologically based suppression of speech. (An employee's statement that mothers of young children ought to stay home, for example, might become actionable.)

Another feminist law professor, Rosa Ehrenreich of the University of Virginia, takes the opposite approach in a 1999 article for the *Georgetown Law Journal*, "Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment." Ehrenreich's argument, favorably cited in the *New York Times Magazine* article, is that sexual harassment should be reconceived as an injury to personal dignity, regardless of gender. In other words, it should be treated as a tort rather than a civil rights violation. The political scientist Ellen Frankel Paul made a similar proposal nearly a decade earlier.

Interestingly, this approach was explicitly rejected in the '70s by feminist legal reformers seeking remedies for sexual harassment. One reason was that civil rights law makes it easier to sue a corporation, with its deep pockets, than an individual harasser. More important, perhaps, feminists wanted sexual harassment to be seen as male oppression of women, not just individual misbehavior.

The current legal model of sexual harassment has become so entrenched that it's hard to see the courts moving away from it any time soon, however persuasive the theoretical arguments or however absurd the actual cases. In the meantime, what seems to be nearly extinct is any appreciation of diverse cultural norms in the workplace—of the fact that some work environments may be relatively straitlaced while others may be raunchy and freewheeling, and that people unhappy with the culture of their current job might simply seek other employment. Obviously, some things are beyond the pale of acceptable workplace culture; physical assaults, such as testicle grabbing, would fit that category. Vulgar humor is a different matter.

For years, some feminists have argued that when it comes to establishing norms of workplace behavior, the sensibilities of the most vulnerable woman should set the standards for everyone else. Giving the same consideration to the most sensitive man is hardly an improvement. ▯

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Tears of a Clown

Michael Moore and the impotence of leftist politics

How did a guy who got his start by selling both *Stupid White Men... and Other Sorry Excuses for the State of the Nation*, a querrilla documentary on Michael Moore has struck it big again with his latest film, *Bowling for Columbine*. The documentary, which garnered high praise and strong ticket sales at last fall's Cannes film festival, claims to be a meditation on American gun violence. But it functions as a symptom of lefty griper angst in these United States. It is also a good illustration of the progressive left's intellectual impotence. The movie is really a feckless collection of sad platitudes for which Moore offers only the barest glimmer of hope for a solution.

To Moore—illogically a very funny guy—America is a naked city full of zero-million stories, all of them bummers. We see deluded Michigan militia members prancing through the woods; scary hobbit-dentist shots of the Columbine massacre with anguished girls all appropriately, and a black woman caregiving part-time because she is still having a crappy divorce fun and the Charybdis of not having a crappy service job. And of course, lots and lots of shooting deaths.

One of the points Moore tries to make is that we're unique—we are #1 in death. He suggests the seeming disease is how we want to stockpile guns. Stronger than that, Moore himself indulges in misleading bottom-getting. Firearm homicides in America fell from 1993 to 1999 by nearly 35 percent, but somehow Moore left that fact on the cutting room floor.

Instead, Moore clubs his audience with the news that the world is sad. Young men are driven to mass killing by high school status games. Six-year-olds kill 6-year-olds because their mothers have to work. Between close-downs, He even plays Louis Armstrong singing "What a Wonderful World" over scenes of cracked corpses.

But except for one scene—in which Dan Hare himself apparently presumed it was too provoking to phone out a comment—Moore offers no suggestions for how to make America a less depressing place. He raises many of the obvious explanations for the high number of American shooting deaths—our violent film history, our violent pop culture, the presence of so many weapons—and then debunks them all. Reading or television does not make a pro-gun control case. It is more existential nightmare than political documentary.

Critics have picked on Moore's *Columbine* final scene as an example of Moore's tendency to gotcha-ism. He corners Charlton Heston, president of the National Rifle Association, and asks him some tough questions about America's high shooting death numbers—questions Moore himself couldn't answer. Heston stumbles, forced mentioning one of Moore's points, then realizes he'd better stop. Moore cuts to show Heston a photo of a kid gunned down by another kid. Moore stumbles lamely away and doesn't look back.

Moore is not being cruel to an old man. The world of anti-gun and gun-controlling forces rights should understand will be prepared to address emotional anecdotal arguments against gun use. Moore, like Heston, ultimately walks away from the subject matter. At the end, the only explanation for each individual gun death is an individual's choice to pull a trigger. Grand sociological theorizing can't provide the thousands of separate answers to why thousands of individuals made that choice. And pressures of background, upbringing and lifestyle, thousands of complications. In the end, Moore, like the progressive left he claims to represent, has no solutions—just laments, jeers, and tragedies.

Two days before the November elections, Moore used his Web site to predict that Democrats would win and predicted that "Tuesday is the day! The day that George W. gets taught a long overdue lesson. The day that we, the MAJORITY of the people who never elected him—get our chance to reclaim a bit of our battered democracy."

It didn't work. We could imagine many anti-Bushers—and Democrats have always loved angsty, but Lebowski-esque complaints for a lively and effective political movement. ■

Mike Doherty is a writer and editor in Los Angeles.

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"LET US DELIBERATE..."

PETERBAGGE@EARTHLINK.NET

...THIS RESOLUTION BEFORE US WOULD ALLOW THE PRESIDENT TO WAGE WAR ON A COUNTRY WE'RE NOT AT WAR WITH, IF — BUT ONLY IF — HE DARN WELL FEELS LIKE IT...
THIS IN SPITE OF THE FACT THAT THE PUBLIC CAN'T MAKE HEADS OR TAILS OF ANY OF THIS...
NOR CAN I, FOR THAT MATTER...
ALL ARGUMENTS YAY OR NAY SHALL NOW BE HEARD...
?
?
...WITH ALL DUE RESPECT TO MY ESTEEMED COLLEAGUES NOW OCCUPYING THE HALLOWED HALLS OF THIS NOBLE INSTITUTION, I MUST DULY NOTE THAT ANYONE WHO VOTES AGAINST THIS MEASURE IS A YELLOW-BELLIED, CHICKEN-LIVERED NANCY BOY WHO WOULDN'T KNOW WHICH END OF A GUN TO SHOOT OUT OF —
HACK! WHEEZE! KOFF!
HURRY UP AND DIE ALREADY!
WILL SOMEONE SUMMON THE SENATOR'S NURSE AGAIN...
...LET THERE BE NO DOUBT THAT I CAN BE JUST AS HAWKISH AND BLOODTHIRSTY AS ANY OF MY MALE COLLEAGUES WHEN IT COMES TO PROTECTING THIS GREAT NATION OF OURS...
THAT BEING SAID, THE ENVIRONMENTAL, FEMINIST, GAY RIGHTS AND ENTERTAINMENT INDUSTRY GROUPS WHO FUND MY RE-ELECTION CAMPAIGNS WOULD HAVE ONE HUGE HISSY FIT IF I SUPPORTED THIS RESOLUTION...
SO I MUST, IN GOOD CONSCIENCE, VOTE NAY...
AND I URGE YOU ALL TO DO LIKE-WISE...
...THIS RESOLUTION IS FAR TOO IMPORTANT TO GET BOGGED DOWN IN THE USUAL PARTISAN WRANGLING THAT FAR TOO OFTEN PLAGUES THESE SACRED CHAMBERS...
HOWEVER, I DISTINCTLY RECALL WHEN THE LOYAL OPPOSITION SHOT DOWN A SIMILAR RESOLUTION BACK WHEN A MEMBER OF MY OWN PARTY OCCUPIED THE WHITE HOUSE, SO I FEEL IT'S MY PATRIOTIC DUTY TO TORPEDO THIS SUCKER STRICTLY OUT OF SPITE...
...I AM SHOCKED, SHOCKED, AT THE CYNICAL, SELF-SERVING CHICANERY AND BACKROOM DEALING THAT SOME OF MY HIGHLY RESPECTED PEERS HAVE BEEN INDULGING IN, IN AN ATTEMPT TO WATER DOWN OR EVEN KILL THIS ALL-IMPORTANT RESOLUTION. HAVE YOU NO SHAME?
I MYSELF WOULD BE DOING EVERYTHING WITHIN MY POWER TO FIGHT THESE ATTEMPTS, WERE I NOT BOGGED DOWN WITH THE COUNTLESS — AND BASELESS — FRAUD AND CORRUPTION CHARGES THAT HAVE RECENTLY BEEN LEVELED AGAINST ME...
...OUR FOUNDING FATHERS MUST BE SPINNING IN THEIR GRAVES OVER THIS RESOLUTION, WHICH CLEARLY FLIES IN THE FACE OF EVERYTHING THEY STRIVED FOR IN ESTABLISHING A REPUBLIC WHOSE SYSTEM OF CHECKS AND BALANCES WAS DESIGNED TO PROTECT US FROM SUCH TYRANNICAL IMPULSES...
BUT SEEING HOW THIS MEASURE MAY BE AN ENORMOUS ECONOMIC BOON FOR MY HOME STATE, I HEREBY CAST THE DECIDING VOTE IN FAVOR OF ITS PASSAGE...
SO MUCH FOR MY "CONVICTIONS"! SOB!

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Courting Stupidity

Why smart lawyers pick dumb jurors.

Walter K. Olson

If a drunk driver plows into you from behind at 70 miles an hour while you are stopped at a red light, you are not likely to live long enough to talk to a lawyer about it. However, Patricia Anderson and her passengers were lucky enough to be riding in a 1979 Chevy Malibu, a car much more solidly built than most of its competition. Six victims survived but suffered severe burns because the immense force of the crash had burst the Malibu's gas tank and ignited a fire.

Although the National Highway Traffic Safety Administration did not (and does not) deem the Malibu's gas tank to be defective in placement, design, construction, or any other way, lawyers for Anderson disagreed and proceeded to sue General Motors, saying the fire might have been averted had the company located the tank somewhere other than toward the rear of the Malibu. (They also disagreed on the crash speed, estimating it at 50 mph.) A Los Angeles jury agreed and in 1999 awarded the plaintiffs $4.9 billion—a figure that exceeded the combined gross domestic product of 11 U.N. member states.

Peter Bagge

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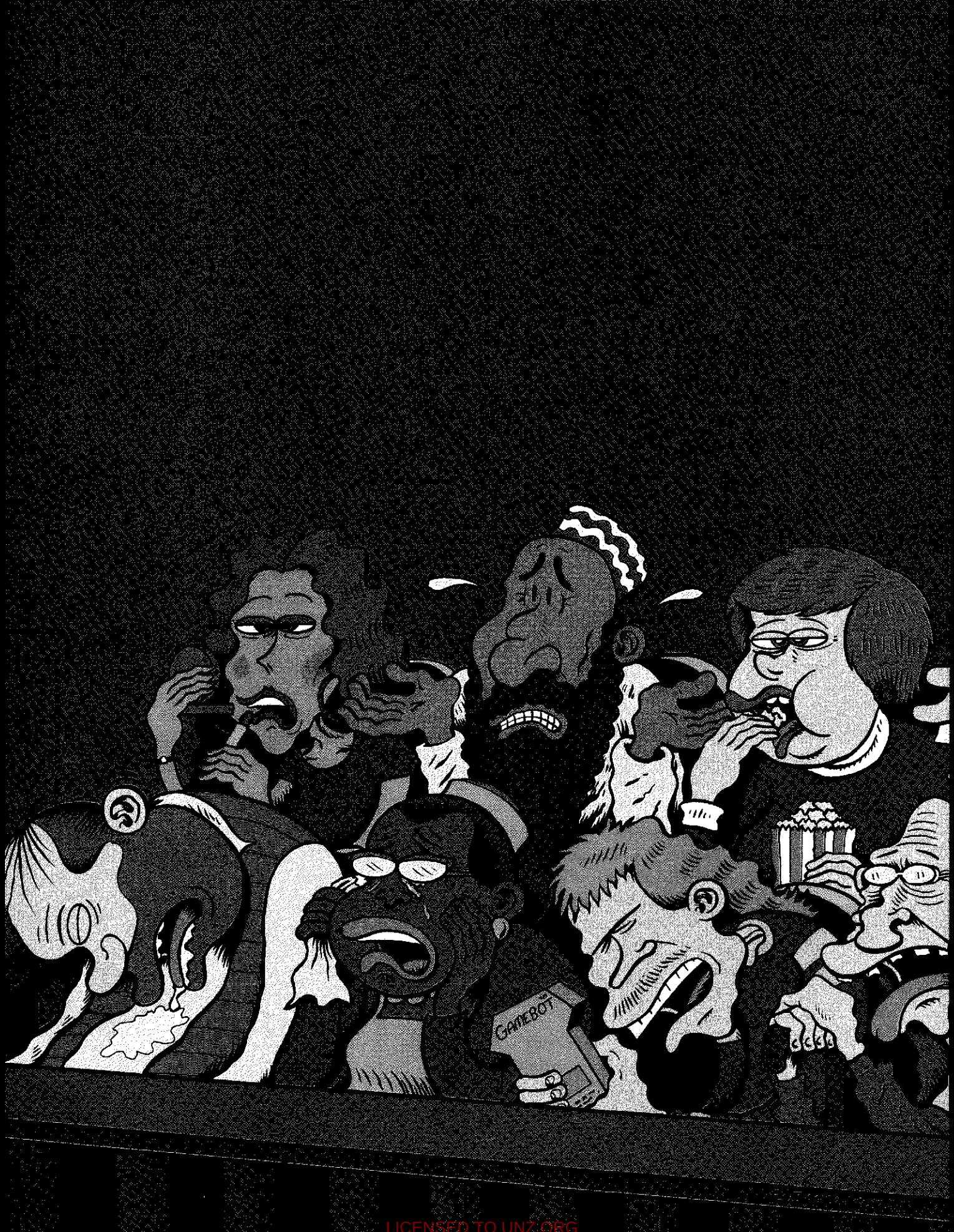

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The award in *Anderson v. G.M.,* later reduced to $1.2 billion, caused something of an outcry. *The Washington Post* said in an editorial that it "makes the tort system into a kind of lottery in which clever trial lawyers and a few victims get very rich at the cost of society's confidence in the justice system." The conduct of the trial had been open to question as well. It turned out that, at the plaintiffs' request, L.A. County Superior Judge Ernest Williams had agreed to exclude from evidence various matters that G.M. wanted to introduce.

Among them were federal government statistics from 20 years of real-world highway experience showing the Malibu to be among the safest cars of its time, with an unusually low crash fatality rate. Nor was the company permitted to introduce crash test data raising safety concerns about the alternative placement of the gas tank that the plaintiffs maintained would be better. Most remarkable of all, Williams had excluded from evidence the fact that the driver of the other car had been drunk (having a blood alcohol concentration of 0.20 percent "several hours later") and had been sent to prison.

As late as the 1980s, jury verdicts higher than, say, $50 million still counted as sensational, but by the end of the century only a billion-dollar verdict could be counted on to merit front-page treatment. Within days of the Los Angeles jury's decision in *Anderson v. G.M.,* a rural California jury voted $290 million over a Ford Bronco rollover accident; like the Chevy Malibu, the Bronco exceeded the federal safety standards of its day. Later, another L.A. jury voted $3 billion in punitive damages in a tobacco case filed by an individual smoker who testified that he'd had no idea the habit was dangerous until congressional hearings in 1994.

Even that paled alongside what happened in a Miami courtroom in July 1999. Following a trial that took two years, a jury deliberated for a mere five hours before deciding that the tobacco industry should pay $145 billion in punitive damages—a sum more than twice the gross domestic product of New Zealand—for having behaved badly toward Florida smokers.

One of the plaintiffs, a 44-year-old nurse, said she "had no idea there was anything wrong with cigarettes at all." The verdict, in a class action styled *Engle v. R.J. Reynolds Tobacco Company,* followed a series of rulings by Miami-Dade Circuit Judge Robert Kaye that were highly favorable to the plaintiffs. The *Engle* verdict was greeted with a less than respectful reception in much of the press. *The Cincinnati Enquirer* called it "ridiculous" and "outrageous," adding, "A ruling that completely ignores personal responsibility is a joke." *The San Diego Union-Tribune* deemed the jury's decision "monstrous" and "outlandish." *The Washington Post* declared, "The biggest damages here may be to the reputation of the legal system." *The Indianapolis Star* said the award "falls somewhere between confiscation and robbery." In November 2000, Judge Kaye upheld the verdict, and the tobacco companies announced their intent to appeal.

Defenders of the legal system typically dismiss cases like *Anderson* and *Engle* as atypical. And it is true that only a tiny number of juries return from deliberations having approved the kind of numbers too large to fit on a calculator display. Moreover, in many of these cases judges subsequently cut the size of the damage award, though usually to a level that is still stratospheric.

But the mere possibility that an extreme outcome will emerge from the process, and perhaps survive review and appeal, gets factored into negotiations in the majority of cases that are settled before a final verdict. With breast implants, asbestos, and many other mass tort episodes, a rash of arrestingly high verdicts helped educate recalcitrant defendants about the need to pony up substantial settlements.

While the press sometimes refers to these eye-popping awards as "runaway" verdicts, the term is more often than not misleading, since it suggests that juries are racing off madly on a tear of their own. Quite the contrary is usually true: Most "runaway" juries are behaving precisely as one set of lawyers has been carefully coaching and skillfully inciting them to do. They are, for the most part, not running *away* from anything but running *toward* a resolution of the case that trial advocates have portrayed to them as reasonable. In seeking to account for exorbitant or unjust verdicts, the most relevant question to ask is usually not, "Why did these jurors behave so irrationally?" but rather, "How did the lawyers manage to portray this outcome as rational?"

Jurymandering

Among the most powerful ways in which American lawyers can shape the outcome of trials is by exercising their rights of juror selection. Typi-

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As late as the 1980s, jury verdicts higher than, say, $50 million still counted as sensational, but by the end of the century only a billion-dollar verdict could be counted on to merit front-page treatment.

cally, they can launch an unlimited number of "for cause" challenges to oust prospective jurors who supposedly cannot approach the case objectively, to which they can add an often substantial number of "peremptory" challenges, which let them dismiss prospective jurors without offering any reasons at all.

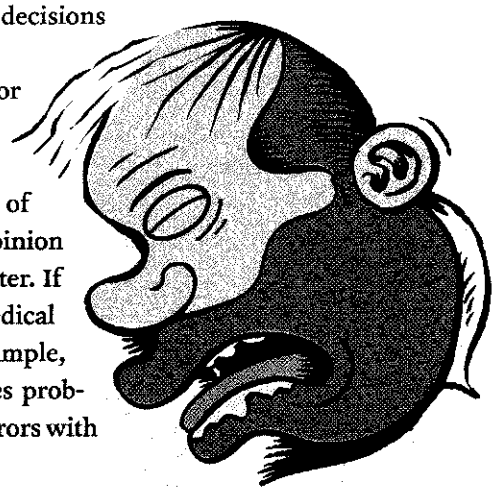
The upshot is that jury selection in high-stakes cases has emerged as a protracted and expensive stage of trial in itself, its results often seen by both sides as vital to the outcome. In the O.J. Simpson case, selection alone lasted 10 weeks, which in most countries would be a remarkably long time for an entire murder trial. The *Engle* tobacco class action in Florida went it one better, with the tweezing and fluffing of the jury pool going on for three months; in the end 800 prospects were sent home in the search for the perfect 18, after having been quizzed on such matters as their reading habits and their views on seemingly unrelated issues such as gun control.

A busy industry of consultants, how-to seminars, and jury selection handbooks offers advice to lawyers on whether or not to boot jurors based on such characteristics as hair style, hobbies, brand of car, and favored kind of reading. The "impartial juror" is just a fiction, declares an ad for a primer that promises to show "how to assemble your winning jury, step-by-step." By the mid-1990s, the jury consulting business was estimated to have passed $200 million in annual revenues, mostly catering to lawyers handling civil cases (that being where the money is).

The whole point of the process, of course, is to engage in discrimination. What makes the hypocrisy complete is that trial lawyers themselves make a very handy living suing when unwary people in other walks of life—employers, landlords, private clubs—engage in the same kinds of discrimination. For most of us, explicitly considering the religion, age, or disability status of a job applicant or prospective tenant is strictly against the law, and even inadvertent acts of bias—resulting from unconscious stereotyping, for instance—can cost us everything we own in a private lawsuit. But if we ever have to face such a discrimination suit, it will practically count as malpractice when it reaches trial for both sides' lawyers *not* to engage in age, religion, or disability discrimination during the jury selection phase.

The group stereotyping in the literature advising lawyers on jury selection is anything but unconscious or inadvertent. Women "are often prejudiced against other women they envy, for example, those who are more attractive," is one groaner from *The Art of Selecting a Jury*, published as recently as 1988. Mexican-American jurors are "passive," and "Orientals...tend to go along with the majority," we learn from a manual in recent use by Texas prosecutors.

Although the U.S. Supreme Court lately has instructed lawyers not to employ race (and even more recently sex) as a factor in jury picking, lawyers continue more or less blatantly to engage in "jurymandering" of both sorts. The edicts are difficult to enforce given that lawyers need offer, in the words of Brandeis University politics professor Jeffrey Abramson, "no justification, no spoken word of explanation, no reason at all beyond a hunch, an intuition" for their peremptory challenges. One can imagine what would happen to the employers or landlords who claimed such a right to base their selection decisions on subjective hunches.



Demography aside, a major goal of the selection process is the removal of any jurors with too strong a base of experience, knowledge, or opinion about the case's subject matter. If a case presents important medical or accounting issues, for example, lawyers on one or both sides probably will want to get rid of jurors with

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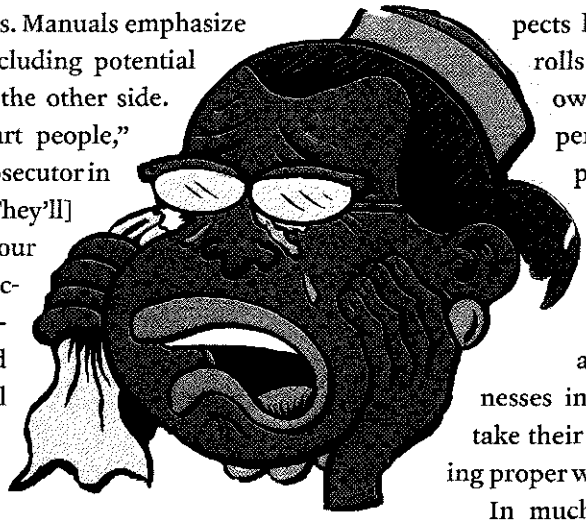
expertise in those areas. Manuals emphasize the importance of excluding potential "opinion leaders" for the other side. "You don't want smart people," says a Philadelphia prosecutor in an old training tape. "[They'll] analyze the hell out of your case." Even before selection begins, busy people often have dodged service, leaving a pool comprised disproportionately of retirees, the unemployed, and workers who can be spared from their jobs.



To make matters worse, a judge in a high-profile case may bounce juror prospects for cause simply because they have followed press reports about the events at issue. In the 1989 trial of Oliver North, for example, the judge flushed out more than 200 potential jurors for knowing too much about the case, which had been on the front pages for months. ("I don't like the news," said the eventual forewoman. "I don't like to watch it. It's depressing.") One panelist, according to *The New York Times*, said of North that "she had seen him on television," but added, "It was just like I was focusing on the Three Stooges or something." Another woman, asked what she knew about the Iran-Contra scandal figure, replied, "I don't know, something about overseas." In the 1990 obscenity trial over a Cincinnati museum's exhibition of Robert Mapplethorpe's work, the only prospective juror who regularly visited museums was dismissed for cause, it being felt that actual familiarity with those institutions put an "unnecessary burden" on her objectivity.

Citizens with the "wrong" views can simply be prevented from serving on juries. According to coverage of the *Engle* trial in the local press, the most frequent reason for dismissing jurors was that they were considered to harbor unacceptable prejudices on the subject of tobacco company liability—apparently typified by a former smoker of three decades who said, "I just think people are and have been well aware of the detriments of smoking....To come back after the fact, I find that somewhat ridiculous."

Lawyers' Full-Court Press

It is all a strange inversion of the once widely held premise that the courts should draw on jurors who are civically engaged and aware of the events of the day. Juror prospects have historically been drawn from rolls of such groups as registered voters, owners of real property, and literate persons—all likely, on average, to display a degree of civic awareness exceeding room temperature. (In the really old days, it was considered an advantage in local jurors that they were personally acquainted with the parties or witnesses in the dispute; that way they could take their reputations into account in assigning proper weight to their stories.)

In much-publicized cases a vast army of recruit material—1,017 prospects in the Los Angeles murder trial of the Menendez brothers—must now be screened in search of the few, the proud, the ill-informed. With hundreds of persons sitting for hours filling out lengthy questionnaires—79 pages in the Simpson case, 45 pages for the trial of Reginald Denny's attackers—the process can take on the air of a giant college entrance exam on awareness of current events, albeit with reverse scoring.

The more exhaustive the questionnaires, the more power the lawyers will have to shape the jury. If enough questions are put to a panel of prospects, most will give at least one answer that can be seized on as evidence of their bias—despite the uncomfortable implication this might leave that most members of the public are not objective enough to serve on juries. Trial lawyers accuse their critics of not trusting juries, but their own practices could scarcely convey greater distrust of jurors as individuals.

The Simpson trial's questionnaire contained 294 queries, including "What was your least favorite subject in school?"; "How important would you say religion is in your life?"; and "Have you ever belonged to Alcoholics Anonymous, the Sierra Club, or the National Rifle Association?" In some cases, lawyers have even been known to hire gumshoes to drive around prospective jurors' homes interviewing neighbors about their private lives—this from the same profession whose avidity in filing invasion-of-privacy suits is almost as great as its avidity in filing discrimination suits.

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By the 19th century, prominent lawyers in the nation's turbulent cities were already making a name for themselves by winning acquittals for obviously guilty malefactors to the cheers of the mob.

One reason pretrial questioning takes so long is that lawyers routinely use it as a way to begin arguing their cases, planting assumptions and factoids that might or might not be admissible at trial. One injury lawyer, quoted in Stephen Adler's 1994 book *The Jury*, said he planned to linger over the otherwise standard questions about whether prospects had ever been an employee of the defendant company by reciting its subsidiaries one after another: Had they ever worked for this one? That one? "That will make it clear that it's a big corporation," he said. Jurors "must not be aware that an attempt is being made to persuade them" during selection, suggests another how-to book for lawyers. "They are convinced that they have changed their minds by themselves."

Worse, some courts permit lawyers to "get a promise" from jurors: If I show A, will you agree to conclude B? Adler quotes one trial lawyer who got jurors to assure him that they could return a "substantial verdict" if he showed thus-and-such; after getting general assent from the panel, he proceeded to call out individual jurors' names: Were you on board? And you? Each, in turn, meekly assented. "The psychological research is very convincing that getting a promise does, in fact, work," an enthusiastic jury consultant told Adler. "If you give them positions, they adopt them."

Jury selection typically becomes a more unpleasant and intrusive process when lawyers succeed in wresting control of it from the judge. Many state courts allow lawyers to grill juror prospects directly, with judges assuming, at most, a referee role.

Jury selection in state courts symbolizes one of the things foreign visitors tend to find so baffling about American trials, namely the extent to which we permit lawyers, rather than judges, to run them. Elsewhere, judges direct the inquiry, framing issues and ordering the assembling of witnesses and evidence; by contrast, the American judge Marvin Frankel notes that in the U.S., "judges generally act as passive umpires....Lawyers produce, direct, and dominate the trial process." Counsel for each side determines what evidence will be brought forward, by which witnesses, in what order, and which issues will emerge and with what kind of emphasis. If neither side's lawyers see fit to introduce a certain significant piece of evidence, then it stays out of consideration, no matter how much light the judge or jurors think it might shed on the case.

A parade of evils that judges in other countries take pains to exclude can be seen almost routinely in many American courtrooms: inflammatory language and interruptions; "endorsement" by lawyers of their clients' cases; stagey eye rolling when their opponents make points; badgering of witnesses; appeals to sympathy or anger; blatantly rehearsed or coached testimony; comments that mislead, distract, or confuse; opening arguments asserting propositions there is no reasonable expectation of proving; closing arguments that endeavor to slip across propositions unsupported by what has come before—all are tolerated in some, though far from all, American courtrooms. (Practices differ enormously from one locality to the next and even between different judges in the same locality.)

The opening and closing arguments of a trial, in which lawyers speak directly to jurors, are particularly susceptible to demagoguery. One attorney laments that the final argument stage "has increasingly turned into a quagmire of personal character attacks, impermissible reference to non-record evidence, and blatant pleas to jurors' sympathies and prejudices." Judges sometimes sit by while attorneys mischaracterize what has been said before, compare opponents to murderers or Nazis, insist on logical inferences that are not, in fact, logically obligatory ("If the gloves don't fit, you must acquit"), address jurors by name, and so forth. If a private lawyer pulls out a Bible and starts quoting from

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it in open court to explain why his opponent should lose, no one from the American Civil Liberties Union will let out a peep.

Why do so many judges in America feel constrained *not* to take control of trials? One reason, notes George Mason University law professor David Bernstein, is that the remedies available to them may seem inadequate to the task. Declaring a mistrial will usually seem like too drastic a reaction when a lawyer steps over the rhetorical line, yet merely instructing jurors to disregard any inflammatory bits is notoriously feeble. And on many matters—granting demands for sidebar conferences or more time to question witnesses, for instance—judges may accurately calculate that they face possible scrutiny from appeals courts if they take a hard line, but relatively little chance of such trouble if they let the lawyer have his way.

Getting the other side's evidence excluded can be as effective a path to victory as introducing prejudicial material of one's own. Such a pattern has turned up in quite a few "big" jury verdicts, starting with *Anderson v. G.M.*, where neither the drunk driver's role in causing the crash nor the car's overall safety record made it into testimony. After managing to get the guilt and imprisonment of the drunk driver excluded, plaintiffs informed the jury that his fault consisted of "five seconds of bad judgment," whereupon the jury allocated to him only 5 percent of the responsibility for the injuries.

Chrysler lost a $262 million verdict, mostly overturned later, over a crash in which a little boy was thrown from a Dodge Caravan. The judge decided that jurors should not be told that the victim had not been wearing his seat belt or that his mother, driving the van, had run a red light. Suzuki lost a $90 million verdict after the trial judge barred evidence that the driver in the crash had attended a wine tasting just before the accident. (The suit was filed by a passenger in the driver's car.) The company got that verdict thrown out, but at the second trial the company was still barred from obtaining medical records on the driver's blood alcohol level.

From much of the advice on jury handling found in the literature, one might conclude that practicing lawyers have a low regard for jurors' acumen. Consultants advise that "logic plays a minimal role" in the courtroom and that the real trick is to identify the jurors' "psychological anchors." A brochure from the San Diego Trial Lawyers Association promotes a video entitled *Trying a Case to the Two Minute Mind; aka Trial by Sound Bite.* It promises to explain how "to streamline each element of a trial based on the fact that most jurors are used to getting a complete story within a two-minute maximum segment on the evening news. This video demonstrates the effectiveness of visual aids, impact words and even colors, to influence the juror's perception and thought process in the least amount of time." A trial lawyer must—as prosecutor-turned-author Vincent Bugliosi has written—"put a bib on the jury and spoon-feed it."

Race in the Courts

No modern story has done more to shake public confidence in trial outcomes than the ultrapublicized 1995 O.J. Simpson trial, in which, after a 133-day, $15 million trial, a Los Angeles jury took just three hours to acquit the former football star. Even within the American legal profession, so given to closing ranks against criticism, few cared to defend the Simpson trial's conduct or outcome. Instead, it was said to have been the fluke result of a never-to-be-repeated confluence of money, celebrity, bungling by the judge and prosecutors, and sheer luck. It was "aberrant," "one of a kind," "in no way typical," and so forth. "The Simpson case is [such] an anomaly that we cannot generalize from it," said a California jury consultant.

Actually, the Simpson acquittal stood in a long tradition: By the 19th century, prominent lawyers in the nation's turbulent cities were already making a name for themselves by winning acquittals for obviously guilty malefactors to the cheers of the mob. Such cases helped put the jury system itself under a cloud, despite its venerable pedigree in Anglo-American law and as a bulwark of liberty in colonial times. "The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury," Mark Twain famously complained. We "swear in juries composed of fools and rascals, because the system rigidly excludes honest men and men of brains."

By the turn of the 20th century, uneasiness over the competence and objectivity of juries was already something of a tradition in itself. Many reformers during the Progressive and New Deal eras distrusted juries for their lack of expertise, their unpredictability, their cumbersomeness

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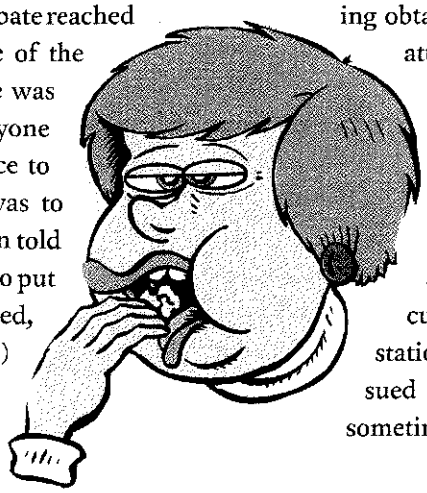
Defenders of the jury system may in fact be most comfortable with the institution when it serves as a sort of queen bee, all-powerful in theory but immobilized and force-fed in practice.

(trials are significantly longer and more expensive when juries are part of them), the lack of a written record explaining their decisions, and, of course, their susceptibility to demagoguery and sectional feeling. What did the most to undermine support for the jury during the 20th century was the record of Southern all-white juries, notoriously lawless and hostile to blacks' interests. It took many years after the fall of Jim Crow for Southern juries to lose their reputation as instruments of white prejudice.

Eventually, the expectation that jury outcomes would be racially tinged would subside—for a while, at least. Yet neither race nor sectionalist sentiment ever actually went away as factors in lawyers' practical courtroom work. By the 1990s, concern about racially tinted verdicts was on the upswing again after a series of high-profile police brutality cases, where such factors had loomed large, as well as reports that prosecutors were finding it hard to obtain convictions on certain types of charges in heavily black cities such as Detroit. A law professor at George Washington University provoked an outcry when he suggested that it might be appropriate for black juries to decline to enforce the law in some prosecutions for nonviolent crimes.

With the Simpson case, the debate reached the front burner. Ironically, one of the most telling facts about the case was that neither the defendant nor anyone else had at first expected his race to play much of a role in what was to come. ("I don't see race," Simpson told a friend. "Race is not an issue." "To put it bluntly," Cochran later explained, "nobody thought of him as black.") But shrewdly perceiving their big chance for a diversionary issue, Simpson's lawyers eventually went to such unsubtle lengths as wearing garments of African kente cloth to court appearances.



When the jury was set to make an on-site visit to the football player's home, Simpson's defense team went so far as to spend a day stripping the walls of their many pictures of white girlfriends, celebrities, and corporate sponsors and replacing them with pictures of Simpson's black relatives, hastily done up as color photocopies at a local Kinko's and framed. In a crowning touch, Simpson's lawyers framed and hung up, in a conspicuous location, one of the most famous images to come out of the civil rights era, Norman Rockwell's 1963 painting of a young black girl being escorted to school by federal marshals.

Though it's a topic that defendants in lawsuits are extremely reluctant to discuss, racial sentiment is looming as a factor against them in more and more civil cases, with help from some in the plaintiffs' bar. Environmental lawsuits, such as those arising from low-exposure tanker spills or pollution in minority neighborhoods, have increasingly scored record-breaking verdicts as lawyers play the "environmental racism" card, arguing that the company would have taken better care of the neighborhood had it been white.

It would be difficult to imagine a mass tort that had less of a connection to race than the *Engle* case in Florida, since smokers are drawn from all ethnic groups. Yet having obtained a heavily minority jury, plaintiffs' attorney Stanley Rosenblatt proceeded to try the case for a racial payoff, putting experts on the stand who depicted smoking as particularly lethal to blacks and hammering away at the tobacco companies for advertising in black magazines and consciously pursuing black customers. (That black publishers, radio stations, and event promoters had avidly pursued such "targeted marketing," and even sometimes complained of racism when they

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weren't able to get enough of it, didn't enter the argument.)

Jury Power

Although the litigation lobby likes to carry on as if the jury is in imminent danger of abolition, there is virtually no organized or even disorganized sentiment in this country in favor of such a drastic step. The consensus that juries are here to stay, however, should not imply that it is impossible to hold a public debate about how best to structure their role.

A legal system needs multiple lines of defense against miscarriages of justice, and historically the jury has had few rivals as a way of protecting defendants from overweening official power. But like any other part of government, a jury can pose a danger to liberty when it begins wielding government power in an affirmative way, as when it extends legal liability into new areas or inflicts arbitrary damage awards. A mechanism that works extremely well as a brake may lead to disaster when pressed into service as an accelerator.

One of the areas where juries are widely seen as having the worst difficulties is in the credible and consistent computation of damages. Given that, one reform worth considering would be to keep with the jury the decision of whether defendants are to be held liable but reserve to the judge the calculation of remedies—just as in most criminal trials the jury resolves the defendant's guilt but the judge alone then decides on sentencing. Even better, perhaps, would be a rule by which judge and jury would separately arrive at damage numbers, and then the verdict would issue at whichever of the two numbers was lower, following the idea that a two-signature check should issue only in the amount for which both parties are willing to feel responsible.

Another set of reforms worth careful consideration would endeavor to give juries more power, rather than less, by rousing them from their artificial passivity. At present juries are subject to numerous constraints that almost seem designed to leave them vulnerable to the forensic skills of those who practice before (and on) them. Usually, for example, they are forbidden to take notes, even while everyone else in the courtroom is scribbling away; nor are they usually supposed to ask or suggest questions, a method well calculated to stifle any intellectual initiative they might show.

The legal instructions on how jurors are to resolve the case are commonly withheld until the last moment, a mode of proceeding one judge has compared with asking jurors to watch a ball game and decide who won without letting them know the rules till play is over. When the guidelines finally do arrive, the judge or his clerk has frequently cast them in legal jargon aimed at withstanding appellate review, which to lay listeners might as well be Serbo-Croatian.

Courts in Arizona and elsewhere recently have experimented with relaxing some of these constraints by letting juries take notes and pose questions to the judge. Much of the legal establishment has greeted these experiments tepidly; many who style themselves as defenders of the jury system may in fact be most comfortable with the institution when it serves as a sort of queen bee, all-powerful in theory but immobilized and force-fed in practice.

The Simpson aftermath led to renewed public calls for judges to take a firmer hand in managing trials, keep questioning on track, curb bullying of witnesses by lawyers, and so forth, which would be all to the good if it happened. It also led to long-overdue calls for reforming the jury selection system, including the abolition or curtailment of peremptory challenges and narrowing of for-cause challenges.

Why does the litigation lobby fight such reforms? Why does it carry on at such length about the jury as a representative institution, then do its best during selection to make it as unrepresentative as it knows how? Why does it endlessly compare the jury box to the ballot box, then turn away from it people it suspects of planning to vote the "wrong" way? These varied positions are not united by the goal of maximizing the power juries get to exert. On closer inspection, they can be seen to share only one common theme: They all arrange matters so as to maximize the power trial lawyers themselves get to exert. Should we be surprised? ▯

Contributing Editor Walter K. Olson is a senior fellow at the Manhattan Institute. *This article is excerpted from The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law (St. Martin's Press, January 2003). Portions of this article were adapted from the author's earlier writing for this magazine.* *©2002 Walter K. Olson. Used by arrangement with St. Martin's Press. All rights reserved.*

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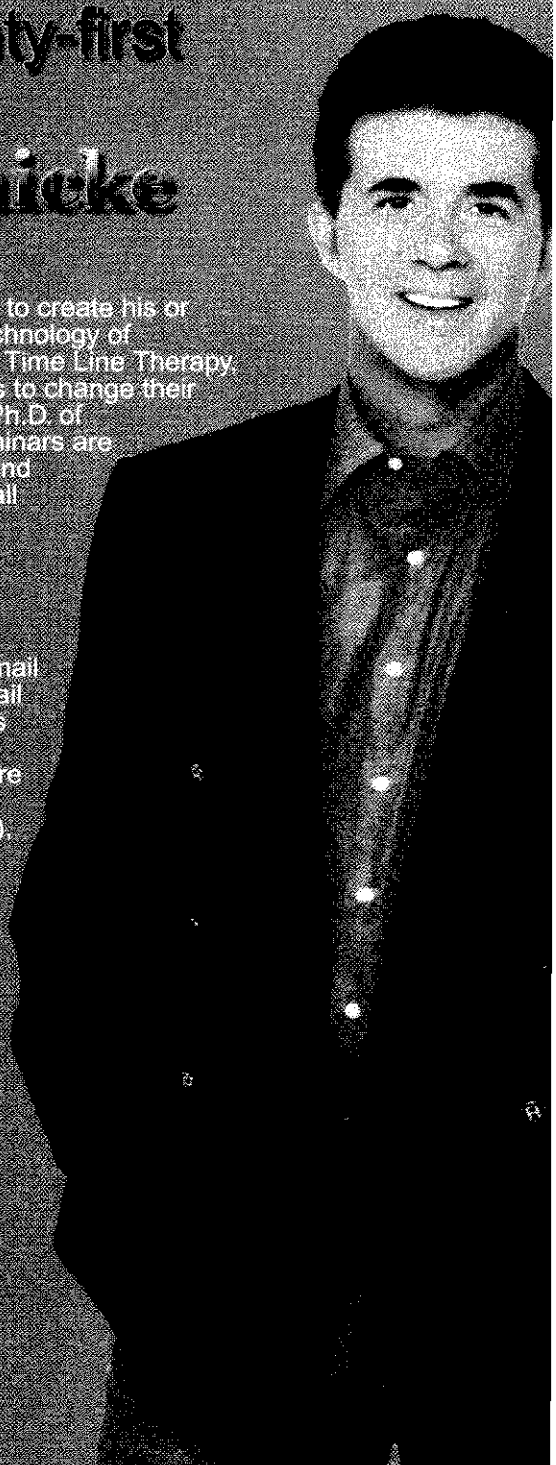

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Pumped-Up Hysteria

Forget the hype. Steroids aren't wrecking professional baseball.

Dayn Perry

HAD KEN CAMINITI been a less famous ballplayer, or had he merely confessed his own sins, then it would have been a transient controversy. But it wasn't. Last May, Caminiti, in a cathartic sit-down with Tom Verducci of *Sports Illustrated*, became the first major league baseball player, current or retired, to admit to using anabolic steroids during his playing days. Specifically, he said he used them during the 1996 season, when he was named the National League's Most Valuable Player. And his truth session didn't stop there.

"It's no secret what's going on in baseball. At least half the guys are using [steroids]," Caminiti told *SI*. "They talk about it. They joke about it with each other....I don't want to hurt fellow teammates or fellow friends. But I've got nothing to hide."

The suggestion that steroids are a systemic problem in professional athletics is hardly shocking, but such candor from players—particularly baseball players, who until recently weren't subject to league-mandated drug testing—was virtually unheard of. Before the Caminiti flap had time to grow stale, Jose Canseco, another high-profile ex-ballplayer, upped the ante, declaring that a whopping 85 percent of current major league players were "juicing."

The estimates were unfounded, the sources unreliable, and the implications unclear. But a media orgy had begun. The questions that are being asked of the players—Do you think it's worth it? How many are using? Why did the players union wait so long to adopt random testing? Why won't you take a test *right now*?—are mostly of the "Have you stopped beating your wife?" variety. The accusation is ensconced in the question.

This approach may be satisfying to the self-appointed guardians of baseball's virtue, but it leaves important questions unexplored. Indeed, before the sport can solve its steroid problem, it must determine whether it even has one.

From those sounding the clarion call for everything from stricter league policies to federal intervention, you'll hear the same two-pronged concern repeated time and again: Ballplayers are endangering their health and tarnishing baseball's competitive integrity. These are defensible, if dogmatic, positions, but the sporting media's fealty to them obscures the fact that both points are dubious.

A more objective survey of steroids' role in sports shows that their health risks, while real, have been grossly exaggerated; that the political response to steroids has been driven more by a moral panic over drug use than by the actual effects of the chemicals; and that the worst problems associated with steroids result from their black-market status rather than their inherent qualities. As for baseball's competitive integrity, steroids pose no greater threat than did other historically contingent "enhancements," ranging from batting helmets to the color line. It is possible, in fact, that many players who use steroids are not noticeably improving their performance as a result.

There are more than 600 different types of steroids, but it's testosterone, the male sex hormone, that's most relevant to athletics. Testosterone has an androgenic, or masculinizing, function and an anabolic, or tissue-building,

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function. It's the second set of effects that attracts athletes, who take testosterone to increase their muscle mass and strength and decrease their body fat. When testosterone is combined with a rigorous weight-training regimen, spectacular gains in size and power can result. The allure is obvious, but there are risks as well.

Health Effects

Anecdotal accounts of harrowing side effects are not hard to find—everything from "'roid rage" to sketchy rumors of a female East German swimmer forced to undergo a sex change operation because of the irreversible effects of excess testosterone. But there are problems with the research that undergirds many of these claims. The media give the impression that there's something inevitably Faustian about taking anabolics—that gains in the present will undoubtedly exact a price in the future. Christopher Caldwell, writing recently in *The Wall Street Journal*, proclaimed, "Doctors are unanimous that [anabolic steroids] increase the risk of heart disease, and of liver, kidney, prostate and testicular cancer."

This is false. "We know steroids can be used with a reasonable measure of safety," says Charles Yesalis, a Penn State epidemiologist, steroid researcher for more than 25 years, and author of the 1998 book *The Steroids Game*. "We know this because they're used in medicine all the time, just not to enhance body image or improve athletic performance." Yesalis notes that steroids were first used for medical purposes in the 1930s, some three decades before the current exacting standards of the Food and Drug Administration (FDA) were in place.

Even so, anabolic steroids or their derivatives are commonly used to treat breast cancer and androgen deficiencies and to promote red blood cell production. They are also used in emerging anti-aging therapies and to treat surgical or cancer patients with damaged muscle tissue.

Caldwell cites one of the most common fears: that anabolics cause liver cancer. There is dubious evidence linking oral anabolics to liver tumors, but athletes rarely take steroids in liquid suspension form. Users almost uniformly opt for the injectable or topical alternatives, which have chemical structures that aren't noxious to the liver. And as Yesalis observes, even oral steroids aren't causally linked to cancer; instead, some evidence associates them with benign liver tumors.

More specifically, it's C-17 alkylated oral steroids that are perhaps detrimental to liver function. But the evidence is equivocal at best. A 1990 computer-assisted study of all existing medical literature found but three cases of steroid-associated liver tumors. Of those three cases, one subject had been taking outrageously large doses of C-17 oral anabolics without cessation for five years, and a second case was more indicative of classic liver malignancy. It's also C-17 orals, and not other forms of steroids, that are associated with decreased levels of HDL, or "good" cholesterol. But, again, C-17s are almost never used for athletic or cosmetic purposes.

Another commonly held belief is that steroid use causes aggressive or enraged behavior. Consider the case of San Francisco Giants outfielder Barry Bonds, whose impressive late-career home run hitting and built-up physique have long raised observers' eyebrows. Last season, Bonds, long known for being irascible, had a dugout shoving match with teammate Jeff Kent. A few columnists, including Bill Lankhof of *The Toronto Sun* and Jacob Longan of the *Stillwater News-Press*, obliquely diagnosed "'roid rage" from afar. "There's very inconsistent data on whether 'roid rage even exists," says Yesalis. "I'm more open to the possibility than I used to be, but its incidence is rare, and the studies that concluded it does exist largely haven't accounted for underlying factors or the placebo effect."

Scientists are nearly unanimous that excessive testosterone causes aggression in animals, but this association begins to wither as you move up the evolutionary ladder. Diagnosing such behavior in athletes is especially tricky. "There's a certain degree of aggression that's not only acceptable but necessary in competitive sports," Yesalis says. "What's perhaps just the intensity that's common to many athletes gets perceived as steroid-linked outbursts."

Fears about steroid use also include other cancers, heart enlargement, increased blood pressure, elevated cholesterol levels, and musculoskeletal injuries. Upon closer examination, these too turn out to be overblown. Reports associating heart enlargement, or cardiomegaly, with steroid use often ignore the role of natural, nonthreatening enlargement brought on by prolonged physical exertion, not to mention the effects of alcohol abuse. The relationship is unclear at best. Evidence supporting a link

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between steroids and ligament and tendon damage is weak, since steroid-related injuries are virtually indistinguishable from those occurring normally. And blood pressure problems, according to Yesalis, have been exaggerated. There is some associative evidence that steroid use can increase the risk of prostate cancer, but this link has yet to be borne out in a laboratory setting. No studies of any kind link the use of anabolics to testicular cancer.

Addiction is a legitimate concern, and Yesalis says a quarter to a half of those who use steroids solely to improve their body image exhibit signs of psychological dependence. "But in all my years of research," Yesalis continues, "I've only known three professional athletes who were clinically addicted to steroids." The distinction, he explains, is that professional athletes see steroids as little more than a tool to help them do their job—the way "an office worker views his computer." Once their playing days are over, almost all the athletes within Yesalis' purview "terminate their use of the drug."

One reason the health effects of steroids are so uncertain is a dearth of research. In the almost 65 years that anabolic steroids have been in our midst, there has not been a single epidemiological study of the effects of long-term use. Instead, Yesalis explains, concerns about extended usage are extrapolated from what's known about short-term effects. The problem is that those short-term research projects are often case studies, which Yesalis calls the "lowest life form of scientific studies." Case studies often draw conclusions from a single test subject and are especially prone to correlative errors.

"We've had thousands upon thousands [of long-term studies] done on tobacco, cocaine, you name it," Yesalis complains. "But for as much as you see and hear about anabolic steroids, they haven't even taken that step."

What about the research that has been done? At least some of it seems to yield engineered results. "The studies linking steroid use to cancer were performed by and large on geriatric patients," notes Rick Collins, attorney, former bodybuilder, and author of the book *Legal Muscle*, which offers an exhaustive look at anabolic steroid use under U.S. law. The hazard of such research is that side effects observed in an older patient could be the result of any number of physiological problems unrelated to steroid intake. Moreover, the elderly body is probably more susceptible to adverse reactions than the body of a competitive athlete.

Collins believes that some studies were performed with a conclusion in mind at the outset. "Their hearts were in the right place," says Collins. "Curtailing nonessential steroid use is a good and noble goal, but they undermined their efforts by exaggerating the dangers." Call it the cry-wolf effect.

For instance, it's long been dogma that use of anabolic steroids interferes with proper hepatic (liver) function and causes thickening of the heart muscle. However, a 1999 study at the University of North Texas found that it's not steroid use that causes these medical phenomena; rather, it's intense resistance training. Weight-lifting causes tissue damage, and, at high extremes, can elevate liver counts and thicken the left ventricular wall of the heart. Both disorders were observed in high-intensity weightlifters irrespective of steroid use. The researchers concluded that previous studies had "misled the medical community" into embellishing the side effects of use.

The engorged arms, chests, and shoulders of today's ballplayers could well be the result of steroid use—but are they helping them hit home runs?

Testosterone-Fueled Panic

The cry-wolf effect may have as much to do with the boom in steroid use as anything else. Athletes were inclined to be skeptical of warnings about steroids because their own experience contradicted what critics were saying. When use of Dianabol and other anabolics began to surge in the 1960s and '70s, opponents decried them as ineffective. The message was: *They don't work, so don't take the risk.* But steroids did work, and users knew it. Once weightlifters, bodybuilders, and other athletes realized they were being lied to about the efficacy of steroids, they were less likely to believe warnings about health hazards, especially when the evidence backing them up was vague or anecdotal.

One of the chief drumbeaters for the steroids-don't-work movement was Bob Goldman, author of the hysterical anti-steroids polemic *Death in the Locker Room*. Goldman, a former competitive power-lifter turned physician and sports medicine specialist, was an early, and shrill, critic of

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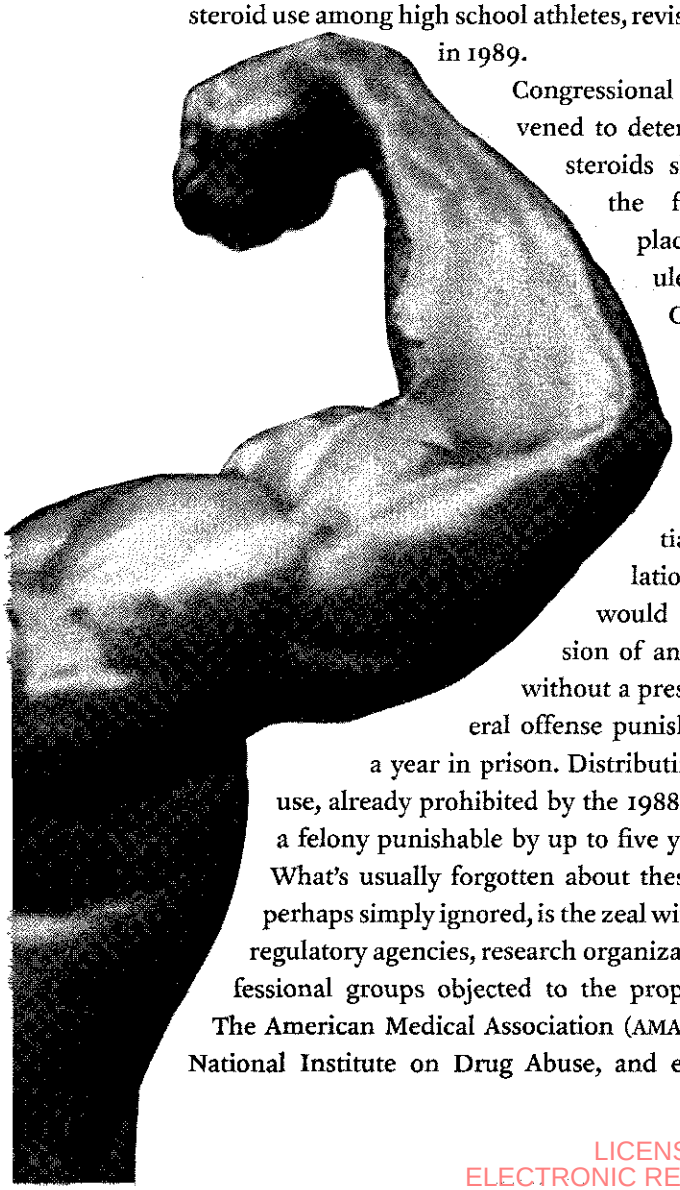
performance pharmacology. In his 1984 exposé, Goldman attributes steroids' tissue-building qualities almost entirely to the placebo effect. His agenda may have been morally sound, but his conclusions ran counter to the preponderance of scientific evidence at the time. Today, his claims are even less supportable. Goldman is working on a new edition of the book, one that he says will better crystallize current scientific thought on the subject. Of his 1984 edition and its seeming histrionics, Goldman says the book was intended "as an educational tool to warn high school students of the possible hazards of drug use, but then it became something else."

Whatever his intentions at the time, Goldman's views played well in the media, which cast the book as a sobering empirical assault on performance-enhancing drugs. Its warnings soon gained traction with lawmakers. Although the Anti-Drug Abuse Act of 1988 had already made it illegal to dispense steroids for nonmedical reasons, Congress, ostensibly out of concern over reports of increasing steroid use among high school athletes, revisited the matter in 1989.



Congressional hearings convened to determine whether steroids should become the first hormone placed on Schedule III of the Controlled Substances Act, reserved for drugs with substantial abuse potential. Such legislation, if passed, would make possession of anabolic steroids without a prescription a federal offense punishable by up to a year in prison. Distributing steroids for use, already prohibited by the 1988 law, would be a felony punishable by up to five years in prison. What's usually forgotten about these hearings, or perhaps simply ignored, is the zeal with which many regulatory agencies, research organizations, and professional groups objected to the proposed changes. The American Medical Association (AMA), the FDA, the National Institute on Drug Abuse, and even the Drug Enforcement Administration all opposed the reclassification. Particularly adamant was the AMA, whose spokespersons argued that steroid users did not exhibit the physical or psychological dependence necessary to justify a change in policy.

Nevertheless, Congress voted into law the 1990 Anabolic Steroids Control Act, which reclassified steroids as Schedule III controlled substances, placing them on legal par with barbiturates and narcotic painkillers such as Vicodin, just one step down from amphetamines, cocaine, and morphine. Now even first-time steroid users faced possible jail time.

Black-Market 'Roids

Prohibition naturally produced a black market, and unintended consequences followed. Besides creating yet another economic niche for the criminal underworld, the legislation scuttled any hope of using steroids as a legitimate and professionally administered performance enhancer.

Criminalization of steroids created dangers more serious than any that had prompted the ban. Once steroids became contraband, many athletes bought black-market anabolics that, unbeknownst to them, were spiked or cut with other drugs or intended solely for veterinary use. Physicians were forbidden to prescribe steroids for promoting muscle growth and thus were not able to provide steroid users with responsible, professionally informed oversight. New league policies even ban the use of steroids for recovery from injuries.

Combine the lack of medical supervision with the mind-set of the garden-variety steroid user, and you have a potentially perilous situation. "Many of those using anabolic steroids," says Penn State's Yesalis, "have the attitude that if one [dose] works, then five or 10 will work even better. That's dangerous."

Athletes who acquire steroids on the black market are loath to consult with their physician after they begin using regularly. If they do disclose their habit and ask for guidance, the physician, for fear of professional discipline or even criminal charges, may refuse to continue seeing the patient. For professional athletes, another

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deterrent to proper use is that all responsible doctors keep rigorously accurate records of their dealings with patients. The fear that those records might be leaked or even subpoenaed makes pro athletes even less likely to seek medical guidance.

Since many of the observed side effects of steroids—anecdotal, apocryphal, or otherwise—most likely result from excessive or improper use of the drug, one wonders: Can steroids be used for muscle building with a reasonable degree of safety? "The candid answer is yes, but with caveats," says Collins, the attorney who specializes in steroid law. "It would need to be under the strict direction of a physician and administered only after a thorough physical examination, and it would need to be taken at reasonable and responsible dosages."

It's a statement that even Goldman, once the bellwether scaremonger, says is "something I could probably agree with."

Herbert Haupt, a private orthopedist and sports medicine specialist in St. Louis, is "absolutely, unequivocally, positively opposed" to steroid use as a training or cosmetic tool. But he concedes that properly supervised use of the drug for those purposes can be reasonably safe. "The adverse side effects of steroids typically subside upon cessation of use," says Haupt, "and use over a short span, say a six-week duration, probably carries nominal risk."

Moreover, the official attitude toward steroid use seems anomalous when compared to the treatment of other methods that people use to improve their bodies. "People die from botched liposuctions," Collins notes. "We're also allowed to inject botulism into people's faces [in botox therapy], but no one is allowed to use steroids for similar cosmetic reasons."

Collins is quick to add that adolescents, whose bodies are already steeped in hormones, cannot use steroids safely. But the fact remains that the illegality of steroids makes responsible professional oversight virtually impossible.

Another puzzling distinction is the one made between steroids and other training supplements. Many baseball players have openly used androstenedione, a muscle-building compound that major league baseball hasn't banned even though it's merely a molecular puddle-jump from anabolic steroids. Androstenedione is a chemical precursor that is converted to testosterone by the liver. Creatine monohydrate, another effective supplement, is far more widely used than androstenedione and is virtually free of stigma. Creatine is chemically unrelated to anabolic steroids or androstenedione and also differs in that it does not manipulate hormone levels; rather, creatine allows muscle cells to recover from fatigue more quickly. But all three substances—creatine, androstenedione, and anabolic steroids—increase a naturally occurring substance in the body to promote the building of muscle tissue. Anabolic steroids simply accomplish this end more quickly and dramatically.

The list of "artificial" enhancements doesn't stop there. Indeed, the boundaries of what constitutes a "natural" modern athlete are increasingly arbitrary. Pitchers benefit from computer modeling of their throwing motions. Medical and pharmacological technologies help players to prevent and recover from injuries better than ever before. Even laboratory-engineered protein shakes, nutrition bars, and vitamin C tablets should theoretically violate notions of "natural" training. Yet no one claims these tools are tarnishing the competitive integrity of the game.

Muscle Beach Zombies

Rangers pitcher Kenny Rogers has said, in a bizarre admission, that he doesn't throw as hard as he can because he fears that the line drives hit by today's players, if properly placed, could kill him on the mound. And you need not read the sports pages for long to find someone complaining that today's "juiced" ballplayers are toppling the game's sacrosanct records by the shadiest of means. This sentiment began percolating when Roger Maris' single-season home run record tottered and fell to Mark McGwire in 1998. Since the Caminiti and Canseco stories broke, sportswriters have been resorting to preposterous rhetorical flourishes in dismissing the accomplishments of the modern hitter. Bill Conlin of the *Philadelphia Daily News*, for example, writes: "To all the freaks, geeks and 'roid zombies who have turned major league baseball into a Muscle Beach version of the Medellin Cartel: Take your records and get lost."

Yet baseball statistics have never existed in a vacuum. Babe Ruth became the sport's chief pantheon dweller without ever competing against a dark-skinned ballplayer. Chuck Klein of the Philadelphia Phillies posted some eye-popping numbers in the 1930s, but he did it in an era

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when runs were scored in bundles, and he took outrageous advantage of the Baker Bowl's right field fence, which was a mere 280 feet from home plate. Detroit pitcher Hal Newhouser won two most valuable player awards and a plaque in Cooperstown in part by dominating competition that had been thinned out by World War II's conscription. Sandy Koufax crafted his run of success in the '60s with the help of a swollen strike zone. Also a boon to Koufax was the helpfully designed Dodger Stadium, which included, according to many, an illegally heightened mound. Gaylord Perry succored his Hall of Fame career by often calling upon an illegal spitball pitch. Take any baseball statistic, and something is either inflating or depressing it to some degree.

Beginning in the mid-'90s in the American League and the late '90s in the National League, home runs reached unseen levels. This fact has encouraged much of the present steroids conjecture. But correlation does not imply causation, as the deductive reasoning platitude goes, and there are more likely explanations for the recent increase in homers.

Home runs are up, in large part, because several hitter-friendly ballparks have opened in recent years. Coors Field, home of the Colorado Rockies since 1995, is the greatest run-scoring environment in major league history. Until the 2000 season, the Houston Astros played in the Astrodome, a cavernous, run-suppressing monstrosity with remarkably poor visuals for hitters. They replaced it with Enron Field (now renamed Minute Maid Park), which is second only to Coors Field in terms of helping hitters and boasts a left field line that's so short it's in violation of major league rules. The Pittsburgh Pirates, Milwaukee Brewers, and Texas Rangers also have recently replaced their old ballparks with stadiums far more accommodating to hitters. The Arizona Diamondbacks came into being in 1998; they too play in a park that significantly inflates offensive statistics. The St. Louis Cardinals, Baltimore Orioles, and Chicago White Sox have all moved in their outfield fences in the last few years. Add to all that the contemporary strike zone, which plainly benefits hitters, and it's little wonder that home runs are at heretofore unimaginable levels.

And then there is Barry Bonds and the momentous season he had in 2001. In the midst of Bonds' siege on McGwire's still freshly minted single-season home run record, Bob Klapisch of the Bergen County, New Jersey, *Record* made a transparent observation-cum-accusation by writing, "No one has directly accused Bonds of cheating—whether it be a corked bat or steroids...."

Bonds is plainly bigger than he was early in his career. That fact, considered in tandem with his almost unimaginable statistical achievements, has led many to doubt the purity of his training habits. But Bonds had bulked up to his current size by the late '90s, and from then until 2001 his home run totals were in line with his previous yearly levels. So there's obviously a disconnect between his body size and his home runs. Last season, bulky as ever, Bonds hit "only" 46 homers, which isn't out of step with his pre-2001 performance. More than likely, Bonds had an aberrant season in 2001—not unlike Roger Maris in 1961.

Steroids vs. the Perfect Swing

This is not to suggest that no ballplayers are taking advantage of modern pharmacology. Rick Collins says he knows some major league ballplayers are using steroids but can't hazard a guess as to how many. And Yesalis believes that at least 30 percent of major league ballplayers are on steroids.

But then there are skeptics like Tony Cooper of the *San Francisco Chronicle*, a longtime sportswriter and 20-year veteran of the weightlifting and bodybuilding culture. During the 2001 season, as Bonds was assailing McGwire's freshly minted home run record, Cooper responded to the groundswell of steroid speculation by writing that he saw no evidence of steroid use in baseball. Cooper had seen plenty of steroid users and plenty of "naked baseball players," and he couldn't name one obvious juicer in the entire sport. As for Bonds, Cooper called the accusations "ludicrous," writing that the Giants' slugger "merely looks like a man who keeps himself in condition."

Canseco, of course, claims 85 percent of players are on steroids. Caminiti initially said half, then backpedaled to 15 percent. Other players have dotted the points in between with guesses of their own. Whatever the actual figure, such widely divergent estimates suggest that not even the ballplayers themselves know the extent of the problem. And if *they* don't know, the pundits assuredly don't either.

A more reasonable (and answerable) question is: If players are on steroids, how much of a difference is it making?

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Not much of one, according to Chris Yeager, a human performance specialist, private hitting instructor, and longtime weightlifter. Yeager's argument is not a replay of Bob Goldman's assertion that steroids function merely as placebos. Yeager posits that the engorged arms, chests, and shoulders of today's ballplayers could well be the result of steroid use—but that they aren't helping them hit home runs.

"Upper body strength doesn't increase bat speed," he explains, "and bat speed is vital to hitting home runs. The upper body is used in a ballistic manner. It contributes very little in terms of power generation." Yeager likens the arms, in the context of a hitter's swing, to the bat itself: simply a means to transfer energy. A batter's pectoral muscles, says Yeager, "are even less useful."

Yeager isn't saying steroid use *couldn't* increase a batter's power. He's saying most ballplayers don't train properly. "There's a difference between training for strength and training for power," he says, "and most baseball players train for strength." If hitters carefully and specifically trained their legs and hips to deliver sudden blasts of power, then steroids could be useful to them, but by and large that's not what they do. "Mark McGwire hit 49 home runs as a 23-year-old rookie," Yeager says. "And, while I think he probably used steroids at some point in his career, he hit home runs primarily because of his excellent technique, his knowledge of the strike zone, and the length of his arms. Barry Bonds could be on steroids, but his power comes from the fact that he has the closest thing to a perfect swing that I've ever seen."

Much Ado About Nothing

In what at first blush seems counterintuitive, Yeager asserts that steroid use may have *decreased* home run levels in certain instances. Specifically, he points to Canseco. "I'm almost positive Canseco used steroids, and I think it hurt his career," says Yeager. "He became an overmuscled, one-dimensional player who couldn't stay healthy. Without steroids, he might have hit 600, 700 home runs in his career."

In short, steroids are a significant threat to neither the health of the players nor the health of the game. Yet the country has returned to panic mode, with both private and public authorities declaring war on tissue-building drugs.

The chief instrument in that war is random drug testing, which major league baseball adopted in September 2002 with the ratification of the most recent collective bargaining agreement. Players can be tested for drugs at any time, for any reason whatsoever. Leaving aside what this implies for players' privacy, testing is easily skirted by users who know what they're doing.

Sprinter Ben Johnson tested positive for steroids at the 1988 Summer Olympics and forfeited his gold medal, but subsequent investigation revealed that he'd passed 19 drug tests prior to failing the final one at the Seoul games. Yesalis says most professional athletes who use steroids know how to pass a drug test. Whether by using masking agents, undetectable proxies like human growth hormone, or water-based testosterone, they can avoid a positive reading. At the higher levels of sports, Yesalis believes, drug testing is done mostly "for public relations." Image protection is a sensible goal for any business, but no one should be deluded into thinking it eliminates drug use.

Steroids are a significant threat to neither the health of the players nor the health of the game. Yet the country has declared war on tissue-building drugs.

Nevertheless, lawmakers are lining up to push the process along. California state Sen. Don Perata (D–East Bay) has introduced a bill that would require all professional athletes playing in his state to submit to random drug testing. Federal legislation could be forthcoming from Sen. Byron Dorgan (D–N.D.). It's unlikely that any bill calling for this level of government intrusion will pass. But the fact that such legislation is even being considered suggests how entrenched the steroid taboo is. Meanwhile, baseball's new collective bargaining agreement has firmly established drug testing in the sport. The Major League Baseball Players Association, contrary to what some expected, agreed to the testing program with little resistance.

The measure won't do much to prevent the use of performance-enhancing drugs in baseball, but it may serve as a palliative for the media. At least until the next cause célèbre comes along. ▮

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Should We Invade Iraq?

A **reason online** debate

John Mueller and Brink Lindsey

In the wake of the 9/11 terrorist attacks, the Bush administration has articulated a new foreign policy for the United States. The "containment" of hostile states has been replaced by a policy of military "pre-emption" and "defensive intervention," which sanctions U.S. military action even against states that are not imminent threats. War with Iraq may be the first major expression of this new policy (as of press time, no shooting had yet begun).

Is such a preventive war justified? In late October, we asked John Mueller and Brink Lindsey to argue the issue on **reason online**. Mueller, who makes the case against war, holds the Woody Hayes Chair of National Security Studies at Ohio State University. He is the author of *Policy and Opinion in the Gulf War* (1994), *Quiet Cataclysm: Reflections on the Recent Transformation of World Politics* (1997), and *Retreat from Doomsday: The Obsolescence of Major War* (1989). **reason** Contributing Editor Brink Lindsey makes the case for war. He's a senior fellow at the Cato Institute and author of *Against the Dead Hand: The Uncertain Struggle for Global Capitalism* (2002). He also publishes www.brinklindsey.com.

The debate unfolded over the week of October 28–November 1, with each participant responding within hours of the other's posting. Readers interested in more information can visit reason.com/debate/ai-debate1.shtml, which includes links to reader responses and **reason**'s archive of 9/11-related coverage.

What's the Rush?

The devil du jour is a feeble tyrant.
John Mueller

In preparing for a war against Iraq, military planners seem to anticipate a walkover. The Iraqi military performed badly in the Gulf War of 1991: Saddam Hussein promised the mother of all battles, but his troops delivered instead the mother of all bugouts. And the planners note that Iraq is even weaker now.

Moreover, the regime appears to enjoy very little support. Saddam Hussein lives in such fear of his own military forces that he keeps them out of Baghdad. It is generally anticipated that most of the military will not fight for him—indeed, that there may be substantial defections to the invaders even among the comparatively coddled Republican Guard.

In addition, the regime really controls only a shard of the country. The Kurds have established a semi-independent entity in the north, and the

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Mueller: American leaders like to declare their country to be "the world's only remaining superpower." But this self-proclaimed status doesn't mean that it is obligatory or possible or wise for the United States to seek to run the world.

hostility toward Saddam's rule is so great in the Shiite south that government officials often consider the region hostile territory.

Advocates of a war with Iraq insist such a venture is necessary because Iraq's feeble, wretched tyranny is somehow a dire and gathering threat to the entire area and even to the United States. Saddam's inept, ill-led, exhausted, and thoroughly demoralized military force, it is repeatedly argued, will inevitably be used by its leader for blackmail and regional dominance, particularly if it acquires an atomic bomb or two.

Exactly how this might come about is not spelled out. The notion that Israel, with a substantial nuclear arsenal and a superb and highly effective military force, could be intimidated out of existence by the actions or fulminations of this pathetic dictator can hardly be taken seriously. And the process by which Saddam could come to dominate the oil-producing states in the Middle East is equally mysterious and fanciful. Apparently, he would rattle a rocket or two, and everyone would dutifully jack up the oil price to $90 a barrel.

Saddam's capacity for making daffy decisions is, it is true, considerable. But he seems mostly concerned with self-preservation—indeed, that is about the only thing he is good at. And he is likely to realize that any aggressive military act in the region is almost certain to provoke a concerted, truly multilateral counterstrike that would topple his regime and remove him from existence. Even if he ordered some sort of patently suicidal adventure, his military might very well disobey, or simply neglect to carry out, the command. His initial orders in the Gulf War, after all, were to stand and fight the Americans to the last man. When push came to shove, his forces treated that absurd order with the contempt it so richly deserved.

During the last half-century American policy makers have become hysterical over a number of Third World dictators, among them Egypt's Nasser, Indonesia's Sukarno, Cuba's Castro, Libya's Qaddafi, and Iran's Khomeini. In all cases, the threat these devils du jour posed to American interests proved to be highly exaggerated. Nasser and Sukarno are footnotes, Castro a joke, and Qaddafi a mellowed irrelevance, while Khomeini's Iran has become just about the only place in the Middle East where Americans are treated with popular admiration and respect.

Significantly, Iran is also just about the only place in the area where the United States has been unable to meddle during the last 20 years. And it is possible there is a lesson here.

With characteristic self-infatuation, American leaders like to declare their country to be "the world's only remaining superpower" or "the indispensable nation." But this self-proclaimed status doesn't mean that it is obligatory or possible or wise for the United States to seek to run the world.

Or even the Middle East. American interests there are limited. There is a romantic and sentimental attachment to Israel, of course, but that country seems fully capable of taking care of itself. In time, perhaps, and probably after a change of leadership on both sides, mediation efforts between Israel and the Palestinians can become productive again. But for now at least the conflict is so deep that there is little any outsider (even an "indispensable" one) can do about it.

Quite a bit of oil comes from the Middle East, of course, but discussions of the American interest on that score tend to ignore simple economics. The area already is dominated by an entity, OPEC, which would dearly love to hike the price for the commodity. It is constrained from doing so not by warm and cuddly feelings toward its customers but by the grim economic realization that such a policy would reduce demand, intensify the search for new petroleum sources, and bring about a worldwide inflation that would

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raise the prices of imported commodities even more than any gains obtained by an increase in the oil price. Whatever happens in the region, this fundamental market reality is likely to mellow and correct incidental distortions.

In the meantime, monarchs in a number of countries may gradually be coming to the realization that they are out of date, rather in the way Latin American militarists more or less voluntarily decided during the last quarter century to relinquish control to democratic forces. If this does happen, however, the process will be impelled, as in Latin America, primarily by domestic forces, not outside ones.

A humanitarian argument could be made for a war against Iraq—to liberate its people from a vicious tyranny and from the debilitating and destructive effects of the sanctions which the United States apparently is incapable of relaxing while Saddam Hussein remains in power. Such a war would have to be kept inexpensive in casualties, and the United States would have to be willing to hang on for quite some time to help rebuild the nation, something experience suggests is unlikely.

But calls for war do not stress this argument. Instead, they raise alarms about vague, imagined international threats that, however improbable, could conceivably emanate from a miserable and pathetic regime. In due course, nature (there have been persistent rumors about cancer) or some other force will remove our devil du jour. The situation calls for patient watchfulness, not hysteria.

No More 9/11s

The case for invading Iraq

Brink Lindsey

John Mueller tries to make light of Iraq. *Feeble, inept, pathetic,* and *daffy* are some of the adjectives he uses to describe the blood-soaked, predatory regime now in power there. The implication is that only the paranoid could find in Saddam Hussein's buffoonery any cause for serious concern.

Well, I beg to differ. Iraq is no joke: The crimes that the Ba'athist regime there has committed and may intend to commit in the future are deadly serious business. Under the reign of Saddam Hussein, Iraq has invaded two of its neighbors, lobbed missiles at two other countries in the region, systematically defied U.N. resolutions that demand its disarmament, fired on U.S. and coalition aircraft thousands of times over the past decade, and committed atrocious human rights abuses against its own citizens, including the waging of genocidal chemical warfare against Iraqi Kurds. In short, this is a regime that is responsible for hundreds of thousands, perhaps millions, of deaths.

Meanwhile, Iraq has a long record of active support for international terrorist groups. Indeed, it apparently has staged terrorist attacks of its own directly against the United States. I am speaking of Iraq's likely involvement in the attempted assassination of former President Bush in Kuwait in 1993.

Most ominously, Iraq has been engaged for many years in the monomaniacal pursuit of weapons of mass destruction (WMD). It reportedly has significant stockpiles of biological weapons, and its aggressive, large-scale nuclear program is thought to be at most a few years away from success. The fact that Iraq has been willing to endure ongoing sanctions, and thus the loss of hundreds of billions of dollars in oil revenue, rather than dismantle its WMD programs shows the ferocity of its commitment to maximizing its destructive capabilities.

In light of the above, I would support military action against Iraq even if 9/11 had never happened and there were no such thing as Al Qaeda. After all, I supported the Gulf War back in 1991 in the hope of toppling Saddam Hussein's regime before it fulfilled its nuclear ambitions. Unfortunately, quagmire was plucked from the jaws of victory in that conflict, and so today we are faced with concluding its unfinished business. In my view, standing by with "patient watchfulness" while predatory, anti-Western terror states become nuclear powers is irresponsible and dangerous folly.

As for the headline question, "What's the rush?," my reply is: North Korea. In 1994 President Clinton, with the help of former President Carter, swept the Korean threat under the rug and trusted that "nature," or something, would deal with that "devil du jour." Now North Korea's psychopathic regime informs us that it has nuclear weapons, a fact that vastly complicates any efforts to prevent the situation from getting even worse. We can look forward to similar complications with Iraq unless we act soon.

The case for action against Iraq is further strengthened by the unfortunate facts that 9/11 did happen and Al Qaeda does exist. Here is the grim reality: Radical Islamism is in arms against the West, and its fanatical followers have pledged their lives to killing as many of the infidel as they possibly can. American office workers in New York and Washington, French seamen in Yemen, Australian tourists in Bali, Russian theatergoers in Moscow—nobody is safe. However exactly this conflict arose, it is now in full flame.

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Lindsey: Welcome to the shadowy world in which we now live. A world in which deterrence no longer suffices. A world in which the judicious use of American power to pre-empt looming threats may be all that stands between us and catastrophe.

And let there be no mistake: This is a fight to the death. Either we crush radical Islamism's global jihad, or thousands, even millions, more Americans will die.

Iraq occupies a strategic position in the war against Islamist terror along several dimensions. First, Iraq's WMD programs threaten to stock the armory of Al Qaeda & Company. Saddam Hussein's regime has a long and inglorious history of reckless aggression and grievous miscalculation. The decision to use terrorist intermediaries to unleash, say, Iraqi bioweapons against the United States strikes me as an entirely plausible scenario, assuming that Iraq's leadership can convince itself that the attack could be carried out with "plausible deniability." Given that more than a year has gone by since last fall's anthrax letter scare and we still have no idea who was responsible, the threat posed by Iraq's WMD programs is far from idle. It is, in fact, intolerable.

Second, the resolution—one way or another—of our longstanding conflict with Iraq will have vitally important repercussions in the larger war against terror. If we proceeded to remove the Ba'athist regime from power, we would make it clear that the United States means business in dealing with terrorism and its sponsors. All those countries that continue, more than a year after 9/11, to demonstrate their incapacity or unwillingness to root out the terrorists in their midst (e.g., Iran, Pakistan, Saudi Arabia, Syria, Lebanon, Yemen) would have newly strengthened incentives to do the right thing. If, on the other hand, all the tough talk against Iraq turned out to have been hot air, U.S. credibility would sustain a major blow. Al Qaeda would be emboldened by perceived American weakness, and countries that have to balance fear of the United States against fear of Islamists at home would be inclined to take U.S. displeasure less seriously.

Finally, regime change in Iraq offers the opportunity to attack radical Islamism at its roots: the dismal prevalence of political repression and economic stagnation throughout the Muslim world. The establishment of a reasonably liberal and democratic Iraq could serve as a model for positive change throughout the region. Of course, the successful rebuilding of Iraq will not be easy, but we cannot shrink from necessary tasks simply because they are hard. And we cannot simply assume that "nature" will bring freedom to a region that has never known it on a time scale consistent with safeguarding American lives.

Mueller's "What, me worry?" attitude captures perfectly the prevailing opinion about Afghanistan circa September 10, 2001. The Taliban were more a punch line than a serious foreign policy issue; only the most fevered imagination could see any threat to us in that miserable, dilapidated country. The next day, 3,000 Americans were dead.

We can't let that happen again.

Suicide Watch

Betting on Saddam's recklessness

John Mueller

It may be useful to parse the argument for a preventive war against Iraq as developed by Brink Lindsey into two considerations: the military threat Iraq presents or is likely to present, and the regime's connection to international terrorism.

The notion that Iraq presents an international military threat seems to be based on three propositions:

1) Iraq will have a small supply of atomic weapons in a few years.

2) Once it gets these arms, Saddam Hussein won't be able to stop himself from engaging in extremely provocative acts such as ordering the military invasion of a neighbor or lobbing missiles at nuclear-armed Israel—acts that are likely to trigger a concerted multilateral military attack upon him and his regime.

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3) If Saddam issues such a patently suicidal order, his military—which he himself distrusts—will dutifully carry it out, presumably with more efficiency, effectiveness, and élan than it demonstrated in the Persian Gulf War.

I will leave it to those more expert in the field to assess the first proposition. At worst we have a window of a few years before the regime is able to acquire atomic arms. Some experts seem to think it could be much longer, while others question whether Saddam's regime will ever be able to gather or make the required fissile material. Effective weapons inspections, of course, would reduce this concern.

The second proposition rests on an enormous respect for what I have called Saddam's "daffiness" in decision making. I share at least part of this respect. Saddam does sometimes act on caprice, and he often appears to be out of touch—messengers bringing him bad news rarely, it seems, get the opportunity to do so twice. At the same time, however, he has shown himself capable of pragmatism. When his invasion of Iran went awry, he called for retreat to the prewar status quo; it was the Iranian regime that kept the war going. After he invaded Kuwait in 1990, he quickly moved to settle residual issues left over from the Iran-Iraq War so that he had only one enemy to deal with.

Above all, Saddam seems to be entirely nonsuicidal and is primarily devoted to preserving his regime and his own personal existence. His brutal killing (and gassing) of Kurds was carried out because they were in open rebellion against him and in effective or actual complicity with invading Iranians during the Iran-Iraq War. Much of his obstruction of arms inspectors seems to arise from his fear that agents among them will be used fatally to triangulate his whereabouts—a suspicion that press reports suggest was not exaggerated. If Saddam does acquire nuclear arms, accordingly, it seems most likely that he will use them as all other leaders possessing such weapons have since 1945: to deter an invasion.

The third proposition is rarely considered in discussions of the war, but it is important. One can't simultaneously maintain that Iraq's military forces will readily defect and can easily be walked over—a common assumption among our war makers—and also that this same pathetic military presents a serious international threat.

The argument connecting Iraq to terrorism is mostly based on arm waving. As Lindsey notes, international terrorists are based all over the world—in fact, just about everywhere except Iraq. Their efforts are hardly likely to be deflated if Iraq's regime is defeated. Indeed, it seems likely that an attack will supply them with new recruits, inspire them to more effort, and provide them with inviting new targets in the foreign military and civilian forces that occupy a defeated, chaotic Iraq. Lindsey suggests that a war is required to make it "clear that the United States means business in dealing with terrorism." I would have thought this was already extremely clear.

Terrorism, like crime, has always existed and always will. It cannot be "crushed," but its incidence and impact can be reduced, and some of its perpetrators can be put out of business. But this is likely to come about through patient, diligent, and persistent international police work rather than costly wars based on tenuous reasoning.

Nasty Realities

Evading them won't make us safe.

Brink Lindsey

John Mueller sees correctly that the Iraq problem has two aspects: 1) regional security and 2) global terrorism. Unfortunately, he fails to grasp the nasty realities of either.

Mueller's assessment of the regional threat posed by a nuclear Iraq is nothing short of fantastic. He pooh-poohs the possibility that Iraq might invade one or more of its neighbors and argues that Saddam Hussein "is primarily devoted to preserving his regime and his own personal existence." Huh? Try telling that to Iran and Kuwait.

Mueller needs to read Mark Bowden's superb, chilling profile of Saddam in the May 2002 issue of *The Atlantic*. Bowden makes clear that Saddam sees himself as a world-historical figure, a man destined to lead pan-Arabia back to greatness. Perversely, every brush with disaster and death "has strengthened his conviction that his path is divinely inspired and that greatness is his destiny." Why on earth should we suppose that a nuclear arsenal—built in reckless defiance of the United States and the world—would temper rather than inflame Saddam's raging megalomania?

Mueller blithely assumes that any future Iraqi aggression would be "likely to trigger a concerted multilateral military attack upon him and his regime" and thus "patently suicidal." Excuse me, but there was no multilateral response to Iraq's attack on Iran, and the world would have been all too happy to acquiesce in Kuwait's disappearance had the first President Bush not stepped in and forced the issue. What makes Mueller think the world would rush in to confront a nuclear-armed Iraq? That task, inevitably, would fall to the United States. Mueller's counsel boils down to

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Mueller: One can't simultaneously maintain that Iraq's military forces will readily defect and can easily be walked over—a common assumption among our war makers—and also that this same pathetic military presents a serious international threat.

this: The United States should avoid war with a relatively weak Iraq today so that it can tangle with a nuclear adversary tomorrow.

What about the nexus between Iraq and terrorism, which Mueller dismisses as so much "arm waving"? Allow me to quote Bowden's article once more, this time from a scene in which Saddam is addressing Iraqi military leaders who run terrorist training camps: "He told [them] that they were the best men in the nation, the most trusted and able. That was why they had been selected to meet with him, and to work at the terrorist camps where warriors were being trained to strike back at America. The United States, he said, because of its reckless treatment of Arab nations and the Arab people, was a necessary target for revenge and destruction. American aggression must be stopped in order for Iraq to rebuild and to resume leadership of the Arab world."

This meeting occurred back in 1996—before the recent heating up of the conflict. So much for Saddam's live-and-let-live foreign policy.

Bellicose rhetoric is one thing; the ability to back it up is something altogether more serious. Here is the ultimate threat, the one that Mueller can't even bring himself to discuss: Iraqi biological or nuclear weapons might someday be put in the hands of terrorist groups. If that were to happen, America could experience horrors that would dwarf those unleashed on September 11.

Opponents of action against Iraq argue that we can rely on deterrence to protect us from such atrocities: No country, not even one as rash as Iraq, would dare to use weapons of mass destruction against the United States because of the threat of overwhelming retaliation. That argument has considerable force with respect to a direct attack by Iraq, but it fails completely to confront the possibility that Iraq could use terrorist intermediaries to do its dirty work while masking its own involvement. How is deterrence supposed to work when WMD lack a return address?

Recall, again, last year's anthrax attacks. We still don't know who was responsible, or whether there was any foreign state involvement. Just this week, a *Washington Post* article cast considerable doubt on the FBI's favored theory that the murders were the work of a disgruntled American scientist—and suggested that an Iraqi role remains a live possibility.

Go back a few more years, to the 1993 plot to assassinate former President Bush in Kuwait. It appears that the attack was an Iraqi operation, but as Seymour Hersh showed in a 1993 *New Yorker* article in which he reviewed the less-than-airtight case in depth, the fact is we're not really sure.

Welcome to the shadowy world in which we now live. A world in which deterrence no longer suffices. A world in which the judicious use of American power to pre-empt looming threats may be all that stands between us and catastrophe.

Here is what we know about the current Iraqi regime: It has weapons of mass destruction and is actively seeking to add to its arsenal. It is rabidly hostile to the United States. It has an established track record of predatory conduct and a demonstrated willingness to take extreme risks in pursuing its predatory ambitions. There is not another country on earth that matches Iraq's combination of destructive capacity, anti-American animus, and recklessness in projecting power. In a shadowy world, this much is clear: We are not safe while the present regime rules Iraq.

Deterring the Egomaniac Dictator

War is not necessary to keep a street thug in check.
John Mueller

Brink Lindsey wants to argue that Saddam Hussein is reckless, but even he concedes that "no country, not even one as rash as Iraq, would dare to use weapons of mass destruc-

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tion against the United States because of the threat of overwhelming retaliation." That is, it is entirely possible to deter Iraq. This deterrent would surely hold for an attack on Israel, which has an enormous retaliatory capacity and an even greater incentive to respond than the U.S. I would suggest that it holds as well for just about any substantial military provocation that Saddam might consider.

It is true that much of the world managed to contain its outrage when Iraq invaded Iran in 1980. But that was because the attack was directed against Khomeini's seemingly expansionary theocracy, which was seen to be a bigger threat at the time. It is simply not true that "the world" was "all too happy to acquiesce in Kuwait's disappearance" when Iraq invaded it in 1990. There was almost universal condemnation of the attack, even from Iraq's erstwhile friend and ally, the Soviet Union, and the debate was over tactics: whether to use war immediately to push back the aggression or to wait to see if sanctions could do the trick.

Reaction to a third Saddam adventure would surely follow the Kuwait pattern, except that the troops would now go all the way to Baghdad. Moreover, as I've suggested, Saddam's army, which even he finds unreliable, would be unlikely to carry out patently suicidal orders even if they were issued—as it showed in the Gulf War of 1991.

Lindsey's appreciation for Saddam's egomania is fully justified. It's just that egomania is standard equipment for your average Third World tyrant. Indonesia's Sukarno haughtily withdrew from the United Nations and set up his own competing operation in Djakarta (only China joined); Egypt's Nasser (Saddam's sometime inspiration), who planned to unite and dominate the Arab world, died quietly in bed after being humiliated by Israeli arms; Khomeini's global revolution has essentially been voted out even in its Iranian homeland; and Cuba's Castro probably *still* hopes to become the new Simón Bolívar of Latin America. Self-important street thugs like Saddam Hussein love to flail and fume in the company of sycophants, but that doesn't make them any less pathetic.

We are left with the warning that Saddam will give weapons of mass destruction to shadowy terrorists to deliver for him. Lindsey is unusual in suggesting that Saddam might do this with nuclear weapons (which, of course, he doesn't have and perhaps never will have). Most observers assume he would selfishly keep them himself to help deter an attack on Iraq.

The case is more plausible for chemical or biological weapons—which, however, have proven to be so difficult to deploy effectively that it is questionable whether they should be considered weapons of "mass destruction" at all, as Gregg Easterbrook pointed out in the October 7 issue of *The New Republic*. But terrorists may be after these weapons anyway, and the question is whether it is worth a war to eliminate one of many potential sources. Moreover, as Daniel Benjamin noted in the October 31 *Washington Post*, the best CIA assessment is that Saddam and Al Qaeda are most likely to bed together if his regime is imminently threatened by the preventive war (it would be in no reasonable sense an act of pre-emption) that Lindsey so ardently advocates.

Weighing the Risks

There's no invisible hand to protect us.
Brink Lindsey

I argue that Iraq is a serious threat to the surrounding region and to us. John Mueller disagrees. I contend that toppling the current Iraqi regime will aid in the broader campaign against Islamist terrorism. Mueller worries that an invasion of Iraq will backfire.

Risks of action, risks of inaction: Which are greater? Solid facts are few and far between; we're forced to make our way based on hypotheticals and maybes and historical analogies. How can we have any confidence that we are weighing the risks intelligently?

One point in my favor is that I am actually weighing the risks. That's why I support military action against Iraq: I believe the risks of inaction outweigh the risks of action.

I am not a reflexive hawk. I opposed our recent military adventures in Panama, Haiti, Somalia, and the Balkans. I would not support military action against, say, Burma, merely because its government is despicable. Odious as it is, the Burmese regime poses no significant threat to its neighbors or to us. I would not have supported making war on China in the 1960s, even though its rulers were wildly anti-American and seeking to develop a nuclear arsenal. Despite the threat China posed to us, the risks of acting were far too great (especially the possibility of an escalation with the Soviets) and the price of victory against such a formidable and fanatical adversary would have been far too high. In that situation, deterrence and diplomacy (in particular, playing the Chinese and Soviets against each other) were the better options.

So on the general question of preventive war—whether to make war now in order to avoid a worse war later—my position is: It depends on the circumstances. The decision

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Lindsey: Hostile regimes that could put weapons of mass destruction into the hands of terrorists are a direct threat to the lives of Americans. Military action against them should be an option.

whether to go to war should turn on a pragmatic assessment of relative risks. Sometimes the balance will tilt in favor of action, sometimes not. In the particular case of Iraq in 2002, I believe the balance tilts strongly toward action.

Many who oppose invading Iraq (I won't ascribe this view to Mueller, since he did not spell out his general position clearly) reject the kind of pragmatic assessment that I think is called for. They believe that preventive war is just a bad idea, period—that it's wrong, or at least reckless, to fire the first shot unless you're absolutely sure the other guy is about to squeeze the trigger.

When I'm debating the Iraq question with someone like that, we're talking past each other. I'm explaining the reasons that led me to my conclusion. He's marshaling evidence in support of a predetermined conclusion.

Not that there's anything wrong, in general, with predetermined conclusions—they're called principles. But all principles aren't created equal. Some are sound, some are iffy, and some are downright worthless.

What about the principle of no preventive wars? Specifically, what is the basis for assuming that preventive wars always make matters worse? In economic policy, there are solid grounds for the principle of no government meddling with markets. Market competition has enormous advantages over government action in making use of and coordinating dispersed information, in encouraging innovation, in supplying appropriate incentive structures, and so on. Accordingly, anyone arguing that government intervention in the marketplace can improve economic performance has an extremely difficult case to make.

Many libertarians slide easily from nonintervention in domestic affairs to nonintervention abroad, believing they're on equally firm footing with both positions. But they're not, because the fact is that there's no invisible hand in foreign affairs. There are no equilibrating mechanisms or feedback loops in the Hobbesian jungle of predatory dictatorships and fanatical terrorist groups that give us any assurance that, if the United States were only to stand aside, things would go as well for us in the world as they possibly could.

Accordingly, it seems to me that a no-exceptions policy against preventive war rests ultimately on an untenable assumption: that unrousable passivity on the part of the greatest and most powerful country that ever existed will somehow yield the most favorable achievable conditions in the world—that, in an intricately interconnected world, leaving everything outside our physical borders to the wolves will ensure that everything turns out for the best.

I don't buy it. Hostile regimes bent on relentless expansion and pursuing weapons of mass destruction are a threat to global security. Hostile regimes that could put weapons of mass destruction into the hands of terrorists are a direct threat to the lives of Americans. If regimes fitting either of these descriptions don't change their ways, military action against them should be an option.

Iraq's current regime fits both descriptions. It is not going to change its ways. The risks of war are real but manageable. Let's act before it's too late. ▪

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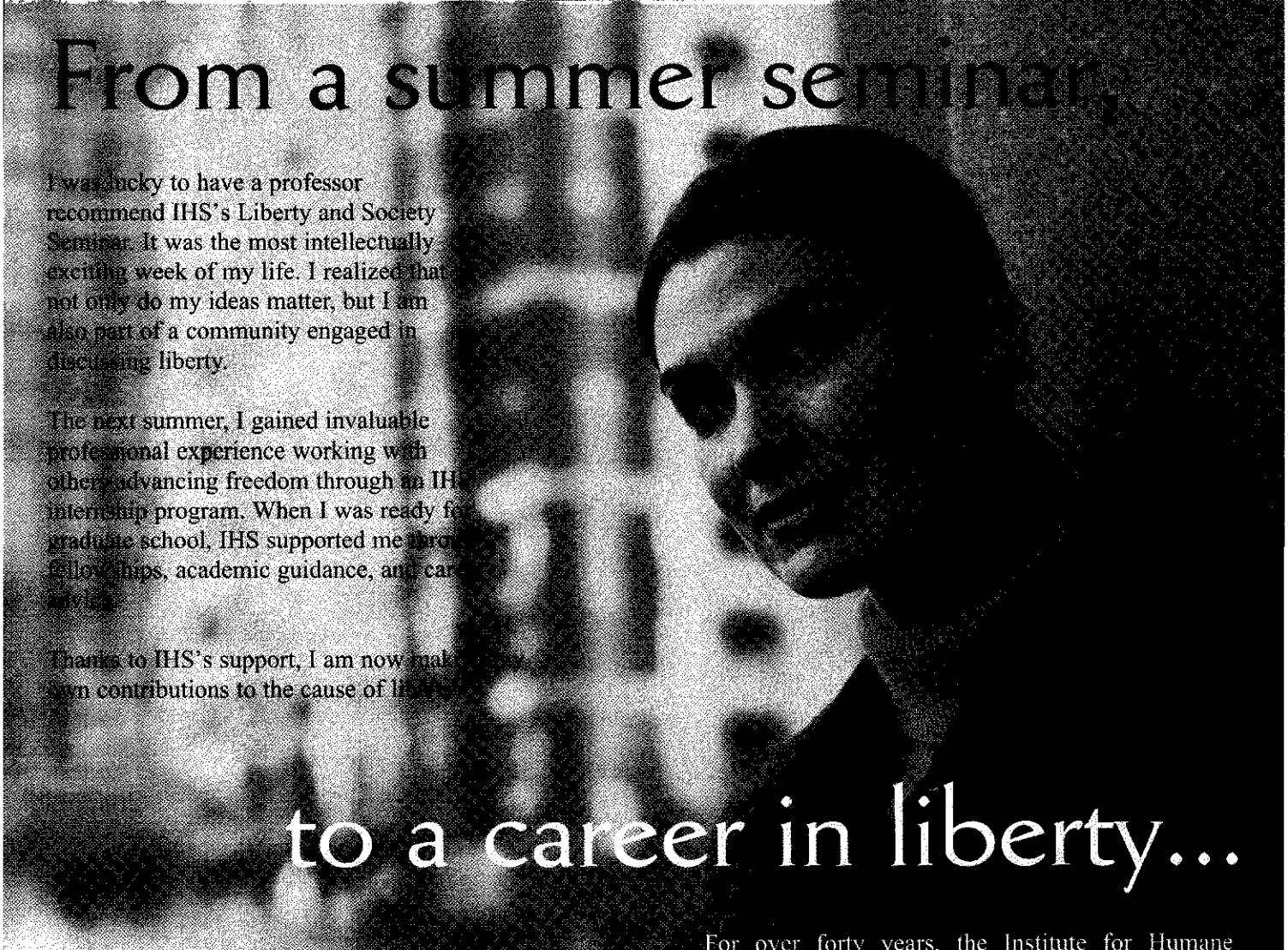

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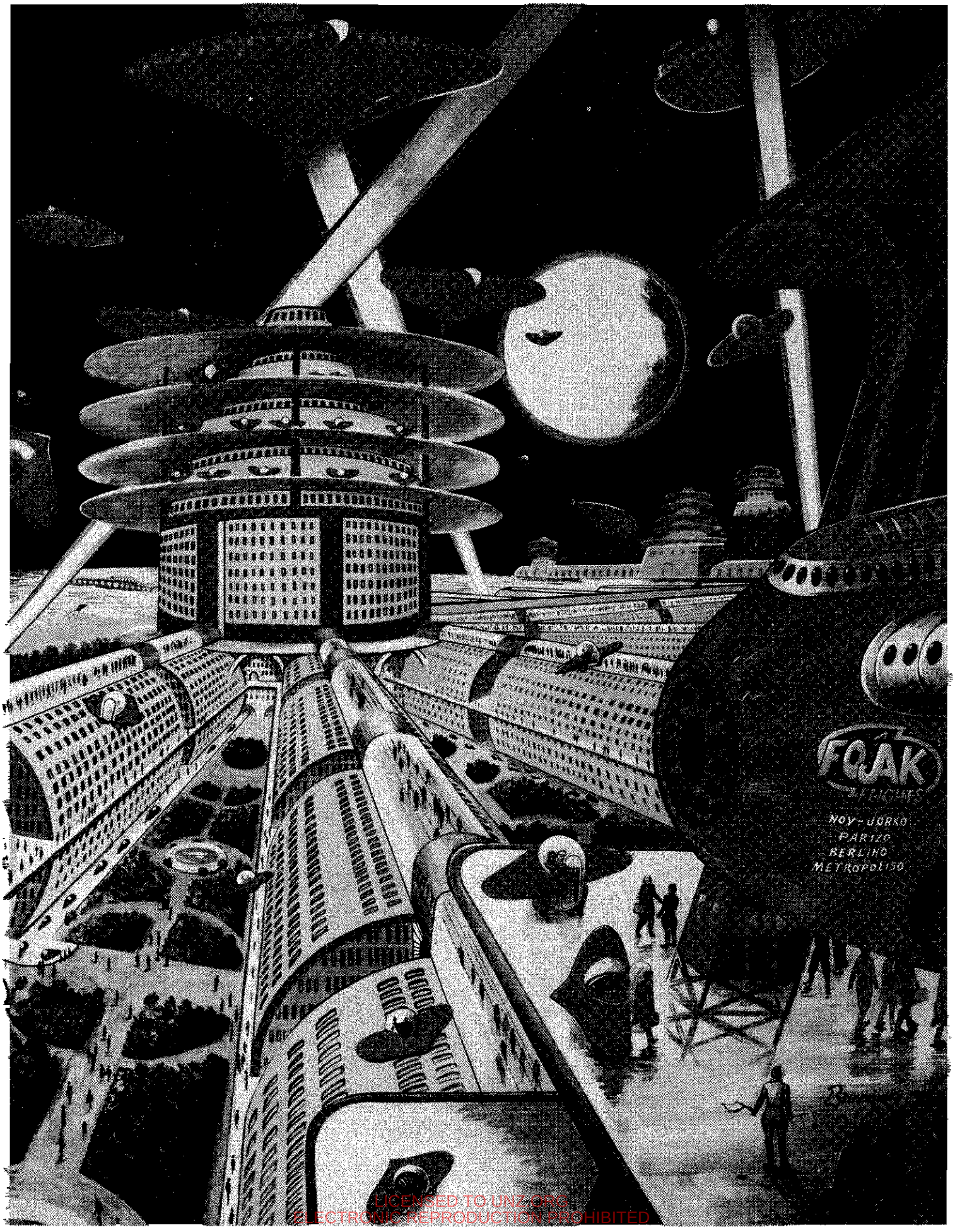

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The Radical 'Burbs

Tracing the surprising roots of social experimentation

Jesse Walker

Suburban Alchemy: 1960s New Towns and the Transformation of the American Dream, by Nicholas Dagen Bloom, Columbus, Ohio: Ohio State University Press, 333 pages, $27.95

One of the most idealistic manifestos of the 1960s took the unlikely form of an intra-office corporate memorandum. "For many years," the mortgage banker James Rouse wrote in 1963, "I have lived uncomfortably with the belief that most planning and architectural design suffers for lack of real and basic purpose." Rouse felt ready to fill that gap. "The ultimate purpose, it seems to me, must be the improvement of mankind," he wrote. "There really can be no other end purpose of planning except to develop better people....An inspired, concerned and loving society will dignify man; will find the ways to develop his talent; will put the fruits of his labor and intellect to effective use; will achieve brotherhood; eliminate bigotry and intolerance; will care for the indigent, the delinquent, the sick, the aged; seek the truth and communicate it; respect differences among man."

Prior to this, Rouse was best known for having built some of the country's first enclosed shopping malls. Within a few years, he was better known as the father of Columbia, Maryland, a social experiment on par, in its way, with Robert Owen's New Harmony or Wavy Gravy's Hog Farm. His memo does not appear in *Suburban Alchemy*, Nicholas Dagen Bloom's informative account of what became known as the new towns movement. But Columbia does. Founded in 1966, Columbia is, if nothing else, one of the most resilient utopias of the '60s: It thrives today, with nearly 90,000 residents, many of whom are unfamiliar with the founding ideals of their town—and in some cases don't know that it had founding ideals to begin with.

American suburbia came into its own in the 1940s and '50s, as policy makers and entrepreneurs joined forces to make the suburbs a viable alternative to city and country life. As millions moved to the new communities, intellectuals complained that the emerging landscape combined too-tightly controlled residential districts with uncontrolled commercial sprawl, fostering a culture that was simultaneously conformist and disengaged. The same critique persists in only somewhat altered form today.

But in the 1960s, something odd happened. The critique was taken to heart not just by dissident philosophers and left-leaning planners but by private, profit-seeking developers. In Bloom's words, these businessmen "brought comprehensive planning back into contemporary suburbia. They fused older suburban community builder traditions with modernist styles and their own original ideas. Unique master plans, unconventional architecture, village and town centers, and landscape design gave definition to their suburban landscapes."

Bloom discusses three such communities: Columbia; Reston, Virginia; and Irvine, California. Though he rightly stresses these towns' ties to the suburban critique of the '50s, their roots go back further. Reston in particular owes a debt to the radical writer Ebenezer Howard, whose *Garden Cities of Tomorrow* (1902) called for suburban towns that would contain and be sustained by both agriculture and industry, with the land held in common by the residents. More moderate variations on this idea were soon built in England and elsewhere in Europe, while Lewis Mumford and his cohorts advanced similar proposals on the western side of the Atlantic.

In America the first tangible result was Radburn, an idealistic effort to build a self-sufficient garden city within two square miles of New Jersey. Whether or not that plan had a chance of succeeding, the project was doomed: It was launched in 1928, and the stock market crash of the next

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year crippled it before it got far off the ground. The community is still there, with about 3,100 people governed by the private Radburn Association. But it stopped dreaming of meeting all its own residential, commercial, and industrial needs long ago.

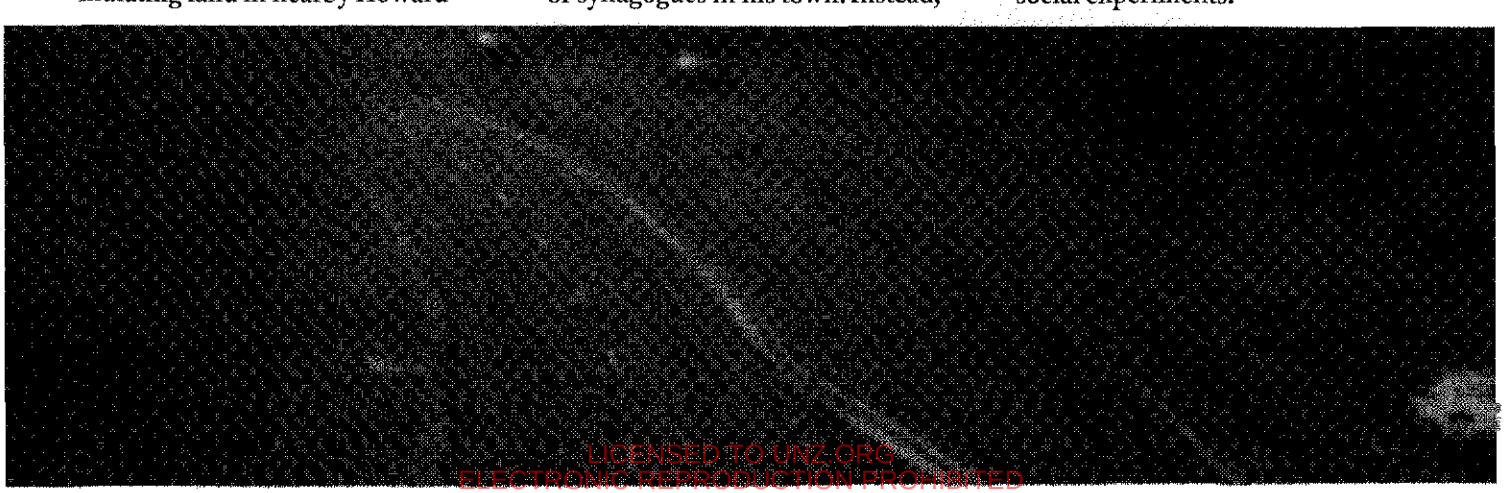
In 1961 Robert E. Simon Jr.—a real estate broker and the son of one of the original Radburn investors—bought the land on which he would build Reston, a town he named after his initials. Reston is a private community, not unlike a condominium—except it has a population of 60,000. It is divided into villages, which are in turn divided into cluster associations (and contain condos, apartment buildings, and noncluster houses as well). Between them, these constitute a system of government that is part homeowners association and part community land trust. Residents whose property does not meet local standards can be penalized: The Reston Association has the legal authority, by voluntary covenant, to tow away cars, cut lawns, or otherwise compel errant homeowners to conform, and then to charge them for the work it has done. The same body is responsible for maintaining Reston's 1,000-plus acres of open space, which include lakes, parks, and nature trails.

As Reston was launched, the Rouse Company was secretly accumulating land in nearby Howard County, Maryland. As the natives realized that a single buyer was acquiring all this property, conspiracy theories started to circulate. Some worried that the Russians were trying to get a foothold near Washington, D.C. Some fretted that the Department of Agriculture was planning to use the county as a biological testing dump cum swamp. A few knew the truth: that James W. Rouse planned to build the "inspired, concerned and loving society" he had outlined in his memorandum of 1963. The result was Columbia.

Rouse's town is governed, like Reston, by a private (though elected) association; it is divided, like Reston, into villages; it is seen, like Reston, as one of the more successful new towns of the 1960s. But there are many differences as well. Some, though important, aren't very obvious: Columbia "taxes" its residents based on the assessed value of their property, while most Restonians pay a fixed unit fee. Some, though obvious, aren't very important: Rouse maintained a foothold in his city until his death in 1996, and Simon was squeezed out of office much earlier, but neither town has ever clutched tightly to one man's vision. And some differences get to the heart of the two communities' respective ideals. Rouse hoped for a new age of tolerance, for example, so he didn't make room for churches or synagogues in his town. Instead, he built generic "interfaith centers" that Columbians of all religions could share.

Reston, too, was built with liberal social ideals in mind. Its founder, after all, is a lifelong Democrat whose parents voted for the Socialist stalwart Norman Thomas. That said, Simon says he doesn't understand why such a fuss was made over his project. "I looked at what we were doing as logical and with ample precedent rather than as social change," he told me in an interview last year. "I was really astonished at all the attention it got." Some of the local real estate brokers warned potential buyers away from Reston on the grounds that it was "communist," Simon reports. "It was the black thing, of course—the integration," he says. "And the townhouses. There were no townhouses in the boonies until Reston."

Pairing integration with townhouses may sound strange, but it reflects Reston's unusual reputation. Like Columbia, it was integrated at a time when that was controversial, especially in the South. (It also advertised itself as a community open to racially mixed couples even though Virginia still had miscegenation laws on the books.) But it was best known for its distinctive design, while Columbia got more attention for its social experiments.



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Visiting Reston's Lake Anne Village Center feels like stepping through a time warp, back to the modern architecture of the late '60s and early '70s. There is a small facsimile of a European-style plaza, surrounded by shops and, upstairs from the stores, homes. More homes, including a high-rise, line the shores of a man-made lake, its artifice revealed by a fountain in the middle of the water. There's a pleasant tinge of the surreal to the place: It somehow feels archaic and futuristic at the same time.

Columbia, by contrast, feels like an enormous office park; it may be the blandest-looking social experiment since the Soviets tried their hand at public housing. True to his roots, Rouse gave his town an enclosed shopping mall in lieu of a downtown. A mall, of course, is not that far removed from a shopping plaza. But you will not find a used book shop, a Baptist church, an art gallery, or a local annex to the town community center at the Columbia mall. And you will not find a Nordstrom's, a Body Shop, or a Sears in Lake Anne Village.

Differences aside, the new towns had a legacy larger than the individual suburbs themselves. In the early days, they inspired similar projects, most not nearly as successful. For the most part, these lie outside the scope of *Suburban Alchemy*, and while Bloom's reasons for excluding them are understandable, they still add up to a tale worth telling. General Electric briefly planned to build 20 such towns around the country, and it seriously considered acquiring Reston as part of the project. It changed its corporate mind when one executive blackballed the purchase on the grounds that Reston was integrated. This scuttled the whole project, since G.E. wasn't about to embark on the P.R. disaster of building 20 exclusively white communities.

With the Housing and Urban Development Act of 1970, the government began underwriting new towns as well. These were built by private entrepreneurs, but the feds offered financing, and with money, naturally, came strings. Simon, fired from Reston in 1968, was briefly associated with one of those projects, a New York community called Riverton. "The relationship with the government was really hideous," he recalls, "because the people administering it were constantly dreaming up things

The new suburbs were open to mixed-race couples and liberated women; and so mixed-race couples and liberated women came.

that they thought would be fun." An example: The feds decided that every new town would have to present a budget for the next five years, with the first year broken down into monthly budgets. If *any* of the items in the budget deviated from the projection by more than 15 percent, the entire forecast had to be done again. The practical result, Simon reports, was that "every developer had to do a five-year projection every month."

Most of the federally financed new towns failed. The most successful was The Woodlands, near Houston. The most infamous was Soul City, launched by the Black Power leader Floyd McKissick in the North Carolina backwoods. A rural town in a depressed area, Soul City never stood a chance of attracting the 55,000 citizens its founder forecast. Today it holds just a handful of residents, unless you include the tenants of the county prison.

The idea of fusing social idealism with profit-seeking suburban development persists today with the New Urbanism, a philosophy favoring compact, mixed-use neighborhoods modeled on the small towns of prewar America. (See "Room to Grow," February 2001.) Both Bloom and Simon criticize the new movement, Bloom contrasting its "upper-class reform spirit" with the "social and cultural idealism" of the earlier movement (while conceding that the new towns were "elitist in their own way"). Simon is even harsher. "I don't know if you've paid any attention to the New Urbanism," he says. "Well, that's not a walkable community. There's a cross street with cars every block. So the idea that you can send a 5-year-old out to get his popsicle, which is what the self-appointed emperor of the New Urbanism, [Andres] Duany, says he can do, is just ridiculous."

Reston, by contrast, has pedestrian underpasses (and, to a lesser extent, so does Columbia). They don't cover the whole town, Simon concedes: Most notably, Highway 267, dividing the north part of Reston from the south, cannot be passed on foot. But someone in the Lake Anne Village area can get to work, school, or the grocery store without a vehicle. The New Urbanists, for their part, criticize Reston precisely because it segregates pedestrians from cars.

The new towns today are not identical to the blueprints that birthed them. In 1967, when Reston faced the threat of bankruptcy, Gulf Oil took it over. (The town's current corporate parent is Terrabrook, a land

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development company.) Simon was soon ousted, and his more radical plans for the town were reined in. Lake Anne still reflects Reston's founding ideals, more or less, but the other village centers don't, especially on the north side of town. "We were supposed to have seven town centers," recalls Simon, who left Reston shortly after he lost his job but returned when he retired in 1993. "Well, what we have is one village center and six shopping centers." The attempt to mix the housing stock—and, as a result, to mix income levels—was also dropped.

It isn't just the financiers who have moved from the new towns' original principles. Real communities evolve over time: They are settled by actual people, and their desires do not always coincide with those of the founders. The interfaith centers are still there in Columbia, but so is a recently built synagogue. Rouse thought his town would attract blue-collar workers; instead, he got an inordinate number of psychologists.

If the towns were known in the 1970s as hotbeds of social experimentation, that had as much to do with the liberal sorts who moved there as it did with the innovations programmed into the cities by their creators. The new suburbs were open to mixed-race couples and liberated women; and so mixed-race couples and liberated women came. In the '80s, Irvine—the only one of Bloom's three subjects to become an incorporated city—elected a government well to the left of most of America, even as its commercial centers seemed more influenced by nearby Disneyland than by Berkeley. (Its governments in the '90s have been more conservative.)

Four decades after they were begun, the new towns are half-breeds; their founding visions have been crossbred with the territory around them. In Bloom's words, they are "landscapes that are similar to the mainstream yet strategically different"—though the similarities and differences are sometimes less intentional than that word "strategically" implies. It's the citizens who make a city, shaping it to their individual needs even as the city, in turn, shapes them. Columbia isn't as integrated as it used to be, and there are those who worry that Rouse's dream of racial harmony has failed. Then again, the nearby suburb of Crofton was built to be an exclusively Caucasian enclave, a destination for white flight. Today, blacks and other racial minorities live there freely. If Columbia hasn't lived up to the idealists' expectations, then Crofton has exceeded them. Both were built to realize particular dreams, and both, without losing their distinct identities, have moved toward the median.

Now Simon sits in his high-rise apartment over Lake Anne, reflecting on the ways his garden city has both held to and drifted from his vision. Duany cries foul whenever a New Urban colony fails to conform to his blueprint, blaming any subsequent problems on those deviations from the philosophy. And in Reston and Radburn and Columbia and Crofton and Irvine and all the rest, it is the citizens who push their towns in new, unpredictable directions, influenced but not bound by the founders' ideals. ▮

Associate Editor Jesse Walker (jwalker@reason.com) is the author of Rebels on the Air: An Alternative History of Radio in America (NYU Press).

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Tempest in a Coffeepot

Starbucks invades the world.

Jackson Kuhl

The Seventh International Festival of Arts and Ideas, held last June in New Haven, Connecticut, was one of those upscale boho fairs filled with puppets and Andean pan pipes aimed at the Birkenstock-and-Volvo set. A guest speaker was explaining why foreigners hate us. He railed against the "homogenization" of global culture and the threat of "monoculture"—that is, the worldwide replacement of individual, indigenous stores and restaurants with international chains.

"Monoculture," according to the speaker, is why they—Europeans, Arabs, everybody—despise us: They're under cultural siege. Starbucks, he warned, had just opened its first store in Zurich, the alleged birthplace of European coffee, and the Seattle-based chain would do everything it could to displace every native coffee shop in the city. Like infesting alien pods, American culture threatens to transmogrify the planet, as the speaker put it, into one big New Jersey. Starbucks was just one example.

The speaker was Benjamin R. Barber, professor of civil society at the University of Maryland, professional anti-capitalist, and relentless self-promoter. (You can tour his glossy temple of ego at benjaminbarber.com.) My reaction to his scenario was simple: If the Swiss don't like Starbucks, they shouldn't patronize Starbucks. To Barber this is fatuous; he is a proponent of "strong democracy," under which a bureaucracy would restrain Starbucks to protect mom-and-pop coffeehouses.

I suspect there is room in Zurich for both. The Swiss like their coffee so much that a whole institution, the Johann Jacobs Museum, is dedicated to the subject. (The price of admission includes a free cup in its dining room.) What is even more thought provoking than the new Starbucks in Zurich is the chain's expansion into Arab countries, whose people have a much longer connection to the coffee bean.

Coffee's history is worth pausing over, because its complex international development raises the question of whether Barber and like-minded critics know what they're whining about. *Coffea arabica* originated in the Ethiopian highlands, where the raw, unroasted beans were masticated and the leaves brewed like tea by the locals. How it spread down to the coast and across the Red Sea to Arabia is uncertain, but it is in al-Makkha that, according to popular belief, a cup of coffee was first brewed around 1200 A.D. Soon coffee made al-Makkha fabulously wealthy. Its plantations were guarded by armies, and fortresses served as bean storehouses. Four centuries later, merchants from Egypt to India lined the docks of al-Makkha, the city from which we derive the word *mocha*, clamoring for the stuff.

A member of the Sufi order of *Shadhili* mystics is credited with first brewing coffee, or *qahwa* (short for *qahwa al-bon*, "wine of the bean" in Arabic), and it quickly spread through the group: Members used it to sustain their all-night spinning ceremonies. These "whirling dervishes," as the West called them, attempted to alter their consciousness through ecstatic gyration, and thus get closer to God. Caffeine helped them do it. Pretty soon, the wandering Shadhilis had transported coffee throughout the Islamic world, where it shed its religious trappings and became an everyday drink enjoyed by commoner and royal alike.

Not that every ruler endorsed it. In 1511 coffee was banned in Mecca as being too similar to alcohol. (The ban was overturned 14 years later.) A century later, the Turkish sultan Murad IV became alarmed that coffeehouses were centers of political criticism, so he enacted the 1633 ver-

[illegible]

He wasn't funny. Just important.

As its title makes plain, the interesting new book *The Trials of Lenny Bruce: The Fall and Rise of an American Icon* (Sourcebooks), by Ronald K.L. Collins and David M. Skover, traces the myriad legal troubles of arguably the most influential comedian of the past 50 years.

But the volume, which also includes a CD of performances, interviews, and commentary narrated by Nat Hentoff, also drives home a point as iconoclastic as the man himself: Lenny Bruce just isn't that funny anymore—if in fact he ever was.

Part of the reason is that the best stand-up is intensely topical, weaving a dense web of brilliant, if necessarily ephemeral, connections to topics of the moment. Part of the reason is that recordings can't do justice to live performances.

Part of the reason is that Bruce's targets—organized religion, politicians, sexual hypocrisy, racism—long ago lost whatever widespread, uncritical support they once might have enjoyed. (To be sure, Bruce himself contributed to this.) Part of the reason is »

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sion of campaign finance reform: Coffee was banned, cafés destroyed, and drinkers beaten or beheaded. In 1675 England's King Charles II ordered closings for the same reasons, but the public outcry was such that he revoked the ban two days before it was to go into effect.

The former coffeehouse owners of the Ottoman world relocated to the more hospitable climate of Europe. Merchant trade, European travelers, and Turkish diplomats also spread the bean west. But coffee didn't enter the Continental mainstream until after the Ottoman Turks were routed from their siege of Vienna by the Poles in 1683, when they left 500 bags of coffee beans behind (the sultan's ban presumably having been reversed). Vienna's first coffeehouse opened two years later. As the result of a single battle, Ottoman expansion was halted and European café culture was born—making Vienna, not Zurich, the birthplace of European coffee.

Americans consumed a little over 10 pounds of coffee per capita in 2000, with 52 percent over age 18 saying they drank coffee the day before, according to a survey by the National Coffee Association of USA. But compared to either the Viennese or Barber's beloved Swiss, we're teetotalers. Austrians drink about 14 pounds, the Swiss 15.5. There are over 4,500 Starbucks outlets in the U.S., or one store for every 61,000 people. In Austria, which boasts but five Starbucks outlets, the ratio is one for every 608,000; in Switzerland (12 stores) it's one for every 1.6 million. There's more of a market for coffee in those two countries but fewer Starbucks per capita. Where's the hegemony Barber warns about?

Perhaps Starbucks hasn't had time yet. The chain has been expanding in the Middle East for years, with 80 stores in Arab countries such as Bahrain, Kuwait, and Saudi Arabia. Nearby countries such as Egypt and Syria have none. The absence may be explained by a notable lack of interest in coffee: The average Egyptian consumes only 0.13 pound in a year; the average Syrian, two pounds. Obviously Starbucks goes where there's a taste for joe. The three Arab nations with the lowest Starbucks-to-people ratios are the United Arab Emirates (UAE) (one per 104,000), Kuwait (one per 111,000), and Qatar (one per 267,000). Yet the Lebanese have 11 stores, one for every 336,000 people, and consume 9.5 pounds of coffee per capita, putting them on a par with Americans and outstripping the other three: The UAE consumes five pounds per capita; Kuwait, three; and Qatar, 2.5. Jordanians, who consume five pounds of coffee per capita, have zero Starbucks outlets.

What those worried about "monoculture" really fear is cross-cultural contamination. But no culture is truly indigenous or untouched by others.

Like every other business in the world, Starbucks has a specific clientele to which it appeals. For whatever reason, Starbucks is attractive not to all Arabs but rather to a particular sort of Arab. This is why Barber's imagined threat of monocultural, chain-driven sprawl across the face of the planet will never materialize. For anything like that to happen, there would have to be homogeneity of taste and thought. Starbucks will never assimilate the entire human race until we

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* *Rolling Stone*

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all have exactly the same wants and likes. In short, Barber has it backward. Material culture such as a Starbucks store doesn't create cultural conformity. It is cultural conformity—ideas and beliefs accepted individually, then shared by a group of like-minded individuals—that creates material culture.

What those worried about monoculture really fear is cross-cultural contamination: the dilution of foreign cultures by contact with America. But no culture is truly indigenous or untouched by others. Starbucks itself is an American repackaging of Italian coffee culture. The chain was originally indistinguishable from any other coffee shop. But in 1983 Starbucks chairman Howard Schultz (then head of marketing) took a business trip to Milan and was blown away by the grace and style—not to mention the coffee—of the city's 1,500 espresso bars.

Schultz eventually differentiated Starbucks from other American coffeehouses by modeling it on his Italian experience, with certain modifications to suit American tastes. These include chairs for loitering, jazz overhead instead of opera, and an Italian-sounding nonsense language (such as "frappuccino" and "tazo tea") that one ex-Starbucks exec freely admits was concocted in a boardroom. This just adds another stage in the international epic of coffee drinking: Starbucks customers, whether in Zurich or Beirut, are drinking an American version of an Italian evolution of a beverage invented by Arabs brewed from a bean discovered by Africans.

Anti-globalizers often ignore the fact that corporations are not charities giving away their products; they have customers who *choose* to buy their goods and services. Starbucks is "a mega-corporation destroying hundreds of mom-and-pop cafés," writes Stewart Lee Allen in his 1999 history of coffee, *The Devil's Cup*. "But that's just something large corporations do."

No, that's just something consumers do—millions of them, making individual decisions every day. Personally, I tend to avoid Starbucks when I can. It has nothing to do with globalization or culture or politics or even coffee; the chain's tall-grandé-venti menu simply presents too steep a learning curve for my small-medium-large brain. If others felt as I do, then Barber and his anti-globalization compadres would have their wish and Starbucks would vanish from the earth like the Ottomans did from the gates of Vienna. With 6,000 Starbucks in the world—and counting—the globe's coffee drinkers evidently feel differently. At least for now.

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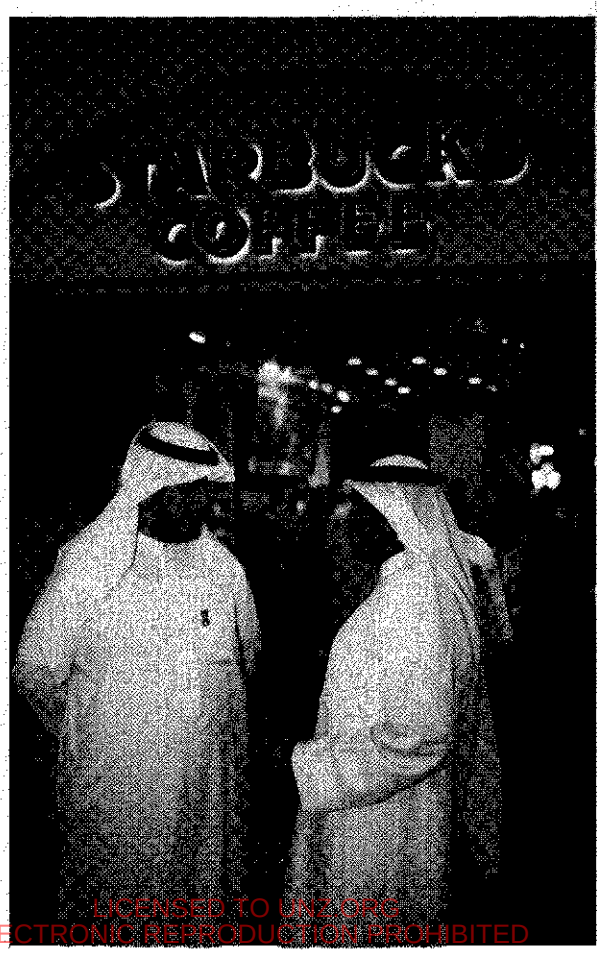

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that Bruce's insistence on his didactic function—"I'm a surgeon with a scalpel for false values," he used to say—transformed him into an adults-only version of the tedious magazine *Highlights for Children*, whose subtitle threatens to deliver "Fun With a Purpose."

Although his mostly baby boomer champions will disagree, it's tempting to say that Bruce was truly funny only twice in his tortured, abbreviated career—and only once intentionally.

The first time came when he appeared at the Village Theater in New York just a few days after John F. Kennedy had been assassinated. As the biographer Albert Goldman told it, "The more sensitive people among the crowd were feeling a cramp in their guts. They were very worried about how Lenny would treat the subject of the assassination. He couldn't avoid the world's biggest topic, and yet it was terrifying to think what might happen if he said something crude or 'sick.'"

Already in the thick of the legal hassles that would plague him unto death, Bruce took the stage and let a long, pregnant silence build. "Poor *Vaughn Meader*!" he finally said, invoking the name of the impersonator whose *First Family* LP had set sales records that would eventually be eclipsed by a JFK memorial album.

The second time Bruce was funny? That came in August 1966, when he overdosed on the toilet of his Hollywood Hills home, a syringe still stuck in »

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Head Games

What are the rules for defining mental illness?

Jacob Sullum

Pharmacracy: Medicine and Politics in America, by Thomas Szasz, Westport, Conn.: Praeger, 212 pages, $24.95

Creating Mental Illness, by Allan V. Horwitz, Chicago: University of Chicago Press, 289 pages, $32.50

I'VE NEVER MET Zacarias Moussaoui, but I have a feeling we would not get along. At a hearing in Alexandria, Virginia, last spring, the accused terrorist said he prayed for "the destruction of the United States of America" and "the destruction of the Jewish people and state." He also had harsh words for Russia. As an American Jew descended from Russian immigrants who has close relatives in Israel, I've got four strikes against me.

Moussaoui not only hates total strangers; he is not exactly gracious toward people who try to help him either. He denounced his court-appointed attorneys as a "blood-sucking death team" of "Jewish zealots." He accused U.S. Judge Leonie Brinkema, who patiently guided him as he struggled to represent himself, of "preparing me for the gas chamber." He refused to meet with an attorney hired by his mother, saying, "My mother has no means to find this lawyer. He has been found by someone else."

Naturally, the FBI was in on the conspiracy too. Moussaoui said the bureau had him under surveillance from the moment he entered the country in May 2001 and therefore knew he did not participate in the planning for September 11. He claimed the bureau bugged his motel room by hiding a microphone in a fan that was "mysteriously left on my car."

Based on such remarks, Moussaoui's original defense attorneys, who officially continued to serve as his advisers even though he refused to speak to them, argued that he had crossed the line between fanaticism and mental illness. They said he was therefore incompetent to represent himself, and perhaps even to stand trial. "Mr. Moussaoui's ideology appears to be interlaced with serious psychopathology, the nature of which is unclear," they told Judge Brinkema.

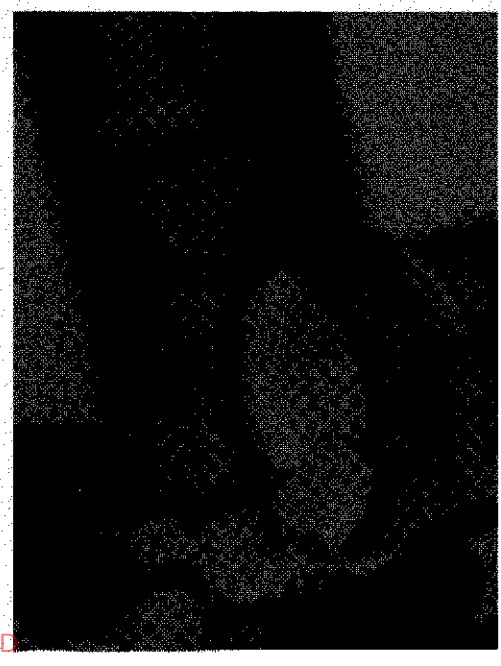
Two psychologists they hired speculated that "Mr. Moussaoui's decision to waive his right to counsel may be the product of a mental disease or defect rendering the decision involuntary." They cited "considerable evidence that Mr. Moussaoui's thinking is dominated by irrational and unrealistic persecutory beliefs." One of them claimed Moussaoui's behavior was "far more consistent with a paranoid psychosis than with being an extremist Muslim."

But the prosecutors had an expert of their own, a court-appointed psychiatrist who interviewed Moussaoui for two hours and concluded that he was capable of deciding for himself how to proceed with his defense. "His actions and attitudes are not the product of mental illness, but are based on his view of the world," the prosecutors said. "He is a fanatic, a jihadist, but he is not mentally incompetent to stand trial or waive his right to counsel."

Brinkema initially agreed, finding that Moussaoui was mentally competent to fire his lawyers. But later she indicated that she might reconsider that decision. She said she would allow the defense attorneys to continue looking for evidence to impugn their former client's sanity. In a handwritten motion filed after that ruling, Moussaoui tried to turn the tables on his examiners, saying Brinkema displayed "acute symptom of Islamophobia with complex gender inferiority." He recommended "immediate psychiatric hospitalization" in the "UBL Treatment Center," explaining that UBL—the government's shorthand for "Usama Bin Laden"—"of course...stand[s] for unique best location."

The dispute over Zacarias

Moussaoui's mental health illustrates the two main dangers that Thomas Szasz has long emphasized in his criticism of psychiatry. Defining behavior as the symptom of a disease can excuse the guilty, something attorneys did in the case of John Hinckley, tried to do with Ted Kaczynski, and might have accomplished with Moussaoui if he had been more cooperative. It can also punish the innocent, since a psychiatric diagnosis may be imposed on someone against his will as a way of limiting his freedom. In Moussaoui's case, the court-



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appointed attorneys tried to take away his right to fire them. In other cases, someone who is not charged with a crime but who is deemed a threat to himself or others because of his mental illness may be locked up indefinitely and forcibly treated.

At the extreme, a psychiatric diagnosis may simply be a cover for suppressing dissent. An article in the Fall 1999 *Journal of Asian Law* describes a retired Chinese coal miner who was diagnosed with "paranoid psychosis"—one of the labels floated in the Moussaoui case—because of his political writings. A diehard Maoist, he criticized Deng Xiaoping's reforms and presented himself as "the leader who would guide the international communist movement during its third high tide." This case of "political lunacy" was presented in an official training manual for Chinese forensic psychiatrists published in 1994. "It was thus presumably seen as a typical illustrative case," the law journal article noted, "the concluding diagnosis being one fully appropriate for study and emulation by others in the legal-psychiatric profession today."

This does not mean that American psychiatrists routinely lock people up because they disagree with their politics. But any diagnostic system that leaves so much room for interpretation, with such serious implications for liberty, ought to be scrutinized carefully and skeptically. Even those who are convinced that some of the conditions treated by psychiatrists are genuine brain diseases should be concerned about a profession that seems bent on cataloging and curing every unpleasant or disapproved thought, emotion, and action.

Szasz, a **reason** contributing editor and a professor of psychiatry emeritus at the Upstate Medical University in Syracuse, has been warning us about the implications of this sweeping agenda for many years. In *Pharmacracy: Medicine and Politics in America*, he offers a concise summary of his views, along with observations about the government's broader involvement in health care. "Disease reveals itself in the *abnormal activity of the body, not of the person*," Szasz writes. "When a lesion can be demonstrated, physicians speak of bodily illnesses. When none can be demonstrated, perhaps because none exists, but when physicians and others nevertheless want to treat the problem as a disease, they speak of mental illnesses. The term 'mental illness' is a semantic strategy for medicalizing economic, moral, personal, political, and social problems."

Rutgers sociologist Allan V. Horwitz is not nearly as strict with his terminology. He argues that "a valid mental disorder" can be a true illness even if it is not caused by a physical abnormality. But in *Creating Mental Illness* he nevertheless presents a devastating critique of the classification scheme embodied in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (or *DSM*), which he portrays as arbitrary, arrogant, and pseudoscientific. His history of how the current system came to be is illuminating and provocative. Unfortunately, the alternative he suggests has serious problems of its own, replacing faux precision with admitted vagueness and subjectivity.

Horwitz emphasizes that psychiatry originally focused on the extremes of mood and behavior that today are called psychoses. He cites substantial evidence from twin and adoption studies that a genetic predisposition plays a role in both schizophrenia and bipolar disorder (a.k.a. manic depression). At the same time, most people who receive these diagnoses do not have a family history of the condition. Furthermore, the identical twins of schizophrenics and manic-depressives do not necessarily turn out the same way. The concordance between identical twins is about 50 percent for schizophrenia and 60

his arm. It was the perfect black comedy ending to his life, a death that perversely proved the worst accusations of his legal and cultural tormentors. The man who had been dubbed "America's No. 1 Vomic!" by Walter Winchell and the "high priest of sick comedians" by *Time* had met his maker in signature style.

Yet to say that Lenny Bruce isn't funny anymore is not to suggest he is unimportant. As a pioneer of the free expression that Americans can now take for granted, Bruce went boldly where no man had gone before—or has had to since.

Born in 1925, Bruce started his career in a country that not only routinely suppressed skin mags but banned *Lady Chatterley's Lover*, *Lolita*, and *Howl* as indecent. From his first obscenity arrest in San Francisco in 1961 through cases in Los Angeles, Chicago, and New York, Bruce and his attorneys challenged American courts—and American culture—to expand the boundaries of protected speech.

Collins and Skover recount the blow-by-blow of Bruce's travails and legal arguments in copious and compelling detail, largely steering clear of the hagiography that has too often attended Bruce in the past. Still, they don't scant his legacy: "Lenny Bruce...create[d] new free speech zones for Americans. In comedy clubs across the country, the unstated can be stated, the unheard can be voiced, and the unholy can be exposed. What »

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percent for bipolar disorder. Clearly, genes are not the whole story.

Horwitz also notes that specific drugs—phenothiazines and clozapine for schizophrenia, lithium for bipolar disorder—can help control the symptoms of these particular conditions but are not effective for people with different diagnoses. He concludes that schizophrenia and bipolar disorder seem to represent discrete entities involving characteristic symptoms that can be alleviated with condition-specific treatments. But he does not draw any firm conclusions about what causes these conditions or whether they qualify as brain diseases.

Szasz cautions (and Horwitz acknowledges) that response to a drug is not a sound basis for diagnosis. The fact that you feel better after snorting cocaine does not mean your original state of mind was an illness. Szasz insists that psychoses should not be considered genuine diseases until there is a valid, reliable diagnostic test that indicates a biological defect. He argues that if a schizophrenic's brain could be distinguished from a healthy brain in the same way that the brain of a person with, say, Alzheimer's disease can be, schizophrenia would be treated by neurologists rather than psychiatrists.

"Physical reductionists [predict] that advances in molecular biology will show that many behavioral abnormalities—now categorized as mental illnesses—[are] bona fide diseases displaying characteristic lesions on a subcellular level," he writes. "I doubt it. But, supposing that that were to happen, the phenomena so identified would cease to be mental diseases and become instead infectious or neurological diseases—much as paresis [syphilitic dementia] and epilepsy ceased to be mental diseases once their pathoanatomical and pathophysiological nature became established."

For Szasz, the fact that psychiatrists, politicians, bureaucrats, and activists are constantly insisting that mental illnesses are *real diseases*, just like cancer or diabetes, indicates that in fact they are fundamentally different. "There are no illnesses outside of the realm of the mental health field whose disease status requires defense by the White House," he slyly notes. "In the end, we come down to the meaning of the term 'mental illness':

The fact that you feel better after snorting cocaine does not mean your original state of mind was an illness.

If we use it to mean brain disease, then psychiatry would be absorbed into neurology and disappear.... However, pyromania is plainly not like multiple sclerosis, and treating a patient with schizophrenia without his consent is plainly not like treating a patient with anemia with his consent."

While Horwitz is more inclined than Szasz to believe that schizophrenia and manic depression have a biological basis, he shows that the case for viewing other mental disorders as inherited brain diseases is weak. At most, he suggests, people may be born with a general predisposition to psychological problems that can be manifested in a wide variety of ways, depending upon psychiatric fashion and the individual's sex, culture, and circumstances.

Using detailed examples, he argues that the malleability of mental disorders explains why symptoms of the same condition (depression, say) vary across cultures; why some disorders occur disproportionately among men (substance abuse) or women (bulimia), among people of a certain social class (neurasthenia), or in certain countries (attention deficit disorder); and why diagnoses and the behavior on which they are based suddenly proliferate (as hysteria, anorexia, and multiple personality disorder did) and later become rare or nonexistent.

From Horwitz's perspective, then, the 400 or so disorders listed in the latest edition of the *DSM* do not represent distinct underlying conditions. Accordingly, it's not surprising that so-called antidepressants such as Prozac and Paxil (known as selective serotonin reuptake inhibitors, or SSRIs) "work equally well for a broad range of disorders including panic, obsessive, and phobic conditions, as well as depressive and anxious states. They are also widely used for substance abuse and eating disorders and for general distress among both adults and children. Moreover, these medications are promoted as ways to enhance the personalities of normal people by improving self-esteem, self-confidence, interpersonal relationships, and achievement." This versatility makes even more sense in light of recent studies indicating that SSRIs may be little more than placebos.

As the range of applications for SSRIs suggests, there is not much (aside from actual diseases) that psychiatrists are not prepared to treat. Horwitz traces this broad purview to Sigmund Freud and his followers. "Neurotic behaviors were conceived as continuous with normal behaviors,

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the two blurring indistinctly into each other," he writes. "The joining of neurotic with normal behavior served at the same time to make pathological, nonpsychotic behavior ordinary and to pathologize everyday behavior." Hence "dynamic psychiatry transformed the jurisdiction of the mental health professions from people with serious mental illnesses to those with problems in their everyday lives....The potential domain of psychiatric classification was now all of human behavior."

By the 1970s, however, dynamic psychiatry was perceived as unscientific, with vague diagnoses, unfalsifiable etiological theories, and weak standards of effectiveness. Seeking to maintain their status as real physicians, and therefore their advantage over competing mental health professionals and their eligibility for coverage by third-party payers, psychiatrists adopted the precise-seeming approach reflected in the third and subsequent editions of the *DSM*. To be accepted by psychiatrists, the new *DSM* had to cover all the sorts of people they were already treating. In addition to distressed individuals seeking guidance and emotional support, these included people coerced into treatment because of their deviant behavior, such as alcoholics, illegal drug users, and juvenile delinquents. "Contrary to the common view that the DSM-III expanded the range of pathology the mental health professions treat," Horwitz writes, "in fact it simply recategorized as discrete diagnostic entities the wide range of problems that dynamic psychiatry had already pathologized."

The result was a bewildering array of diagnoses—including such handy ones as "antisocial personality disorder," "generalized anxiety disorder," "social phobia," "hypoactive sexual desire disorder," "substance abuse," and "pathological gambling disorder"—that could be applied to just about anyone a psychiatrist might encounter. "Defining symptom-based entities made these entities seem as if they were real," writes Horwitz, echoing a point Szasz emphasizes. "The focus on reliability," Horwitz continues, "provided the justification for psychiatry to claim it was scientific without having to demonstrate why any of the classified entities ought to be considered instances of mental disorder." Although the *DSM* is vague regarding the etiology of the conditions it lists, Horwitz notes, "a biomedical model presumes that psychiatric disorders are brain diseases similar to diseases of other bodily organs."

The *DSM* (now in its revised fourth edition, known as *DSM-IV-TR*) disparages its own definition of *mental disorder*, calling it an "anachronism of mind/body dualism," used only because "we have not found an adequate substitute." The implication seems to be that there is no real distinction between physical and mental illnesses because the mind is governed by the brain, which is part of the body. But as Szasz notes, if "everything that happens to or is done by human beings is *biological*, then saying so is a meaningless truism. Attributing mental illnesses, such as addiction and panic disorder, to biological alterations occurring at a 'subcellular level' is a parody of the denial of free will, choice, and responsibility."

The continued use of the term *mental disorder* suggests that psychiatrists do not have the courage of their reductionist convictions. Szasz observes that the term "is useful because it enables psychiatrists to waffle: 'It' may be a disease, or may not be; may render the patient incompetent, or may not; may annul intentionality, but not necessarily; may cause dangerousness to self and others, but not always; and be an excuse for crime, and may not be. It all depends on the psychiatrists' *interpretation* of their so-called clinical observations."

For Horwitz, by contrast, the main problem with the *DSM*'s definition of *mental disorder* is

a tribute to unabashed speech freedom."

Bruce's influence, of course, extends far beyond comedy clubs. You can hear it on talk radio and in recorded music, and it's on display all over cable and even network TV.

And on the U.S. Supreme Court. Collins and Skover persuasively suggest Bruce's ghost hovered over the drama surrounding the most recent major effort by government to regulate speech, the Communications Decency Act of 1996.

The CDA, which prohibited the computer transmission of "obscene, indecent, and patently offensive material" to minors, was "Congress's attempt to turn Internet service providers into vice cops," they write.

When the Court unanimously struck down the law's "indecency" and "patently offensive" provisions as overly broad in *Reno v. ACLU*, it wasn't just a victory for free speech. It was also a First Amendment punchline inspired by Lenny Bruce. ▯

Nick Gillespie is editor-in-chief of **reason**.

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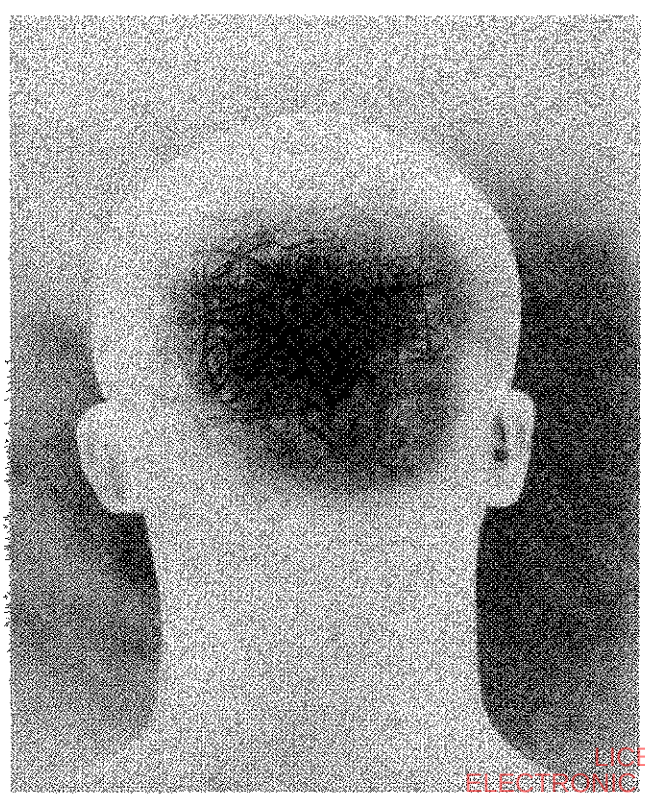
that psychiatrists do not apply it fully and consistently. Borrowing from the sociologist Jerome Wakefield's condensation of the *DSM* standard, Horwitz defines *mental disorder* as "a harmful internal dysfunction" with "socially inappropriate" consequences. Too often, he says, psychiatrists ignore these criteria, improperly treating deviant behavior (such as illegal drug use) and normal, expected responses to stress (such as depression after divorce) as mental disorders.

The problem is even worse when the *DSM*'s symptom lists are applied not to people seeking help from mental health professionals but to samples of the general population diagnosed by survey. Such studies, Horwitz argues, lead to absurdly exaggerated estimates of how many people suffer from particular disorders, or from mental illness in general, because they strip symptoms of their context, which is crucial in determining whether they arise from an "internal dysfunction."



Here is where Horwitz runs into trouble. As persuasive as he is in debunking psychiatry's pseudomedical pretensions, his own approach relies far too much on murky, tendentious definitions that cannot be applied objectively. "Psychological dysfunctions exist when some internal system of cognition, memory, linguistic ability, motivation, aggression, or perception is unable to perform properly," he explains. "A mental disorder indicates that something is wrong with the capacity of an internal mechanism to perform as it is designed to perform, not that an individual has made poor choices in how to behave. This incapacity renders a person unable to conform to social rules and so their impairment is involuntary....The distinction between mental disorders and deviant behavior is the distinction between people who *can't* conform and those who *won't* conform."

Horwitz concedes that telling the difference may be tricky. "The boundaries between 'appropriate' and 'inappropriate' functioning will often be very fuzzy," he says. "The value component of the appropriateness criterion in definitions of mental disorders insures that all disorders will have blurry rather than distinct boundaries." He cites pedophilia as an example. "Adults who sexually molest young children...are generally treated as having criminal responsibility for their behaviors because of the extreme social abhorrence of child molestation," he says. "The distinction between people who can't function appropriately and those who won't function appropriately is far more a moral value judgment than a judgment based on psychiatric knowledge."

It's hard to see how the odiousness of a crime can indicate that it was not the product of an "internal dysfunction." Indeed, people often make the opposite argument: that a crime was so heinous no sane person could have committed it. Horwitz appears to be dodging the implications of his claim that "internal dysfunctions" can make people do bad things. (As Szasz is fond of noting, Congress did something similar when it arbitrarily excluded pyromania and kleptomania from the conditions covered by the Americans with Disabilities Act.) It seems preferable simply to discard the concept of uncontrollable impulses, especially since Horwitz does not explain what causes them (saying only that "social as well as biological or psychological factors might be responsible") or how to distinguish them from ordinary urges.

Although Horwitz rejects the biomedical view of (most) mental disorders, he clings to its most troubling tenet: that people with mental disorders are not responsible for their actions. Whether mental illness is attributed to a hypothetical brain disease or to an "internal dysfunction" of indeterminate origin, the moral implications are the same. Which is why the world needs more skeptics like Szasz, who try to set limits when doctors charge past their proper domain.

Senior Editor Jacob Sullum (jsullum@reason.com) is the author of a book on the morality of drug use, forthcoming in May from Tarcher/Putnam.

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When Ludwig Met Chelsea

Austrian economics hits Manhattan's art scene.

Brian Doherty

A HALF-CENTURY AGO, one of the leading lights of the increasingly influential "Austrian school" of economics, Ludwig von Mises, found it impossible to nab a tenure-track gig at a respectable American college or university. In an age when mathematics and macro variables were overtaking the discipline, Mises saw economics as a logical and deductive science based on individual human choice. Worse, Mises was a champion of radical laissez faire at the high-water mark for Keynesian planning.

As Mises' student Richard Cornuelle, author of an influential book on volunteerism, *Reclaiming the American Dream*, once told me, "It's hard at this distance to realize, but it was more than contempt [that intellectuals] felt for Mises.... They thought he was pushing a vicious, inhuman position that appealed to capitalists but didn't deserve any encouragement. It was an outcast position."

If being embraced by the academy was unthinkable, who could have ever imagined that the Manhattan art scene would someday cozy up to the author of *Human Action* and *Socialism*? Yet in September the Chelsea gallery D'Amelio Terras staged "Drawings for the Austrian School," a solo show by up-and-coming artist John Morris that won praise from *The New York Times*. "Though the drawings look fragile," the reviewer wrote, "they seem to be wired into one another in a way that lends cumulative strength. Altogether, they generate a lot of juice."

Morris' drawings are made with wax crayon, acrylic, ink, graphite, and watercolor. They are, as the *Times* put it, "intricately layered sheets in which dots, spots, traceries, patterns, webs, grids, and other markings of utmost delicacy are made...some tightly controlled, some robotically repetitive in their imagery, they evoke man-made and natural phenomena...electronic circuitry, virus colonies, active spermatozoa, musical notation." They include "A Drawing for F.A. Hayek #1" and "A Drawing for Ludwig von Mises #1" (see right).

The 38-year-old Morris had his first professional solo show in 1998. His interest in the world of business and economics arises, he tells me, from his interest in making and saving money. That caused him to do a lot of self-driven reading in market theory. He first showed this interest in a series of works named after new-economy companies such as the Web-based grocer Peapod, many of which turned out to be dot-bombs.

"I was very aware given the pattern and nature of economic change," Morris tells me, "that in many cases the drawings would outlive the company." Though self-taught in the subject, Morris knows the ins and outs of Austrian economic scholarship and debates. He also knows that his positive attitude toward capitalism makes him unusual in the downtown scene. "I don't have too many friends in the New York art world," he tells me. While he says the economically incorrect focus of his show "didn't create the visceral hatred" he half-expected, "that seemed to be because people know so little about Austrian economics."

How exactly does the thinking of Mises and Hayek inspire Morris, who stresses that he doesn't try to "push a certain message"? "I do the work and then figure out why I did the work," he says. "I always consider my works to be semi-installations. It's all about the patterns and systems and the relationship between separate works" helping to form a larger whole. Such an aesthetic is informed

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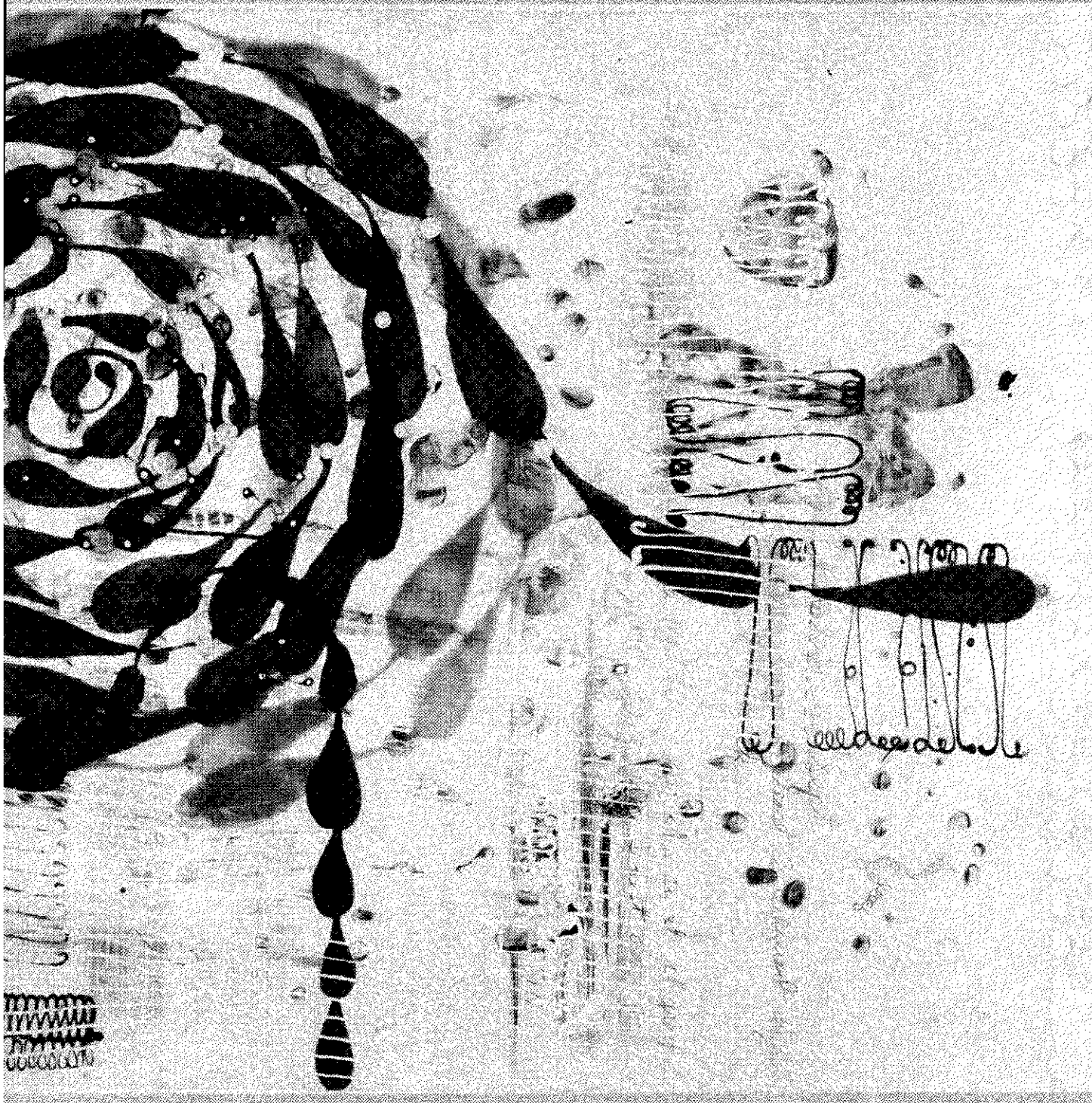

by the Austrian school's stress on pattern formation and its interest in how complex, incredibly varied economic order arises from millions of uncoordinated individual choices.

There may be an even deeper, subtler Austrian element in Morris' work. The greatest achievement of the market process studied by the Austrians is its ability to coordinate disparate human knowledge into a spontaneous order that generates previously unimaginable wealth—the sort of wealth exemplified by Manhattan's art community. While it's unlikely that his swirling, nonrepresentational drawings would have appealed to Mises' and Hayek's generally traditional Viennese tastes, the very existence of Morris' show can be seen as a tribute to their vision of the unpredictable creativity generated by free people in a free economy. ◻

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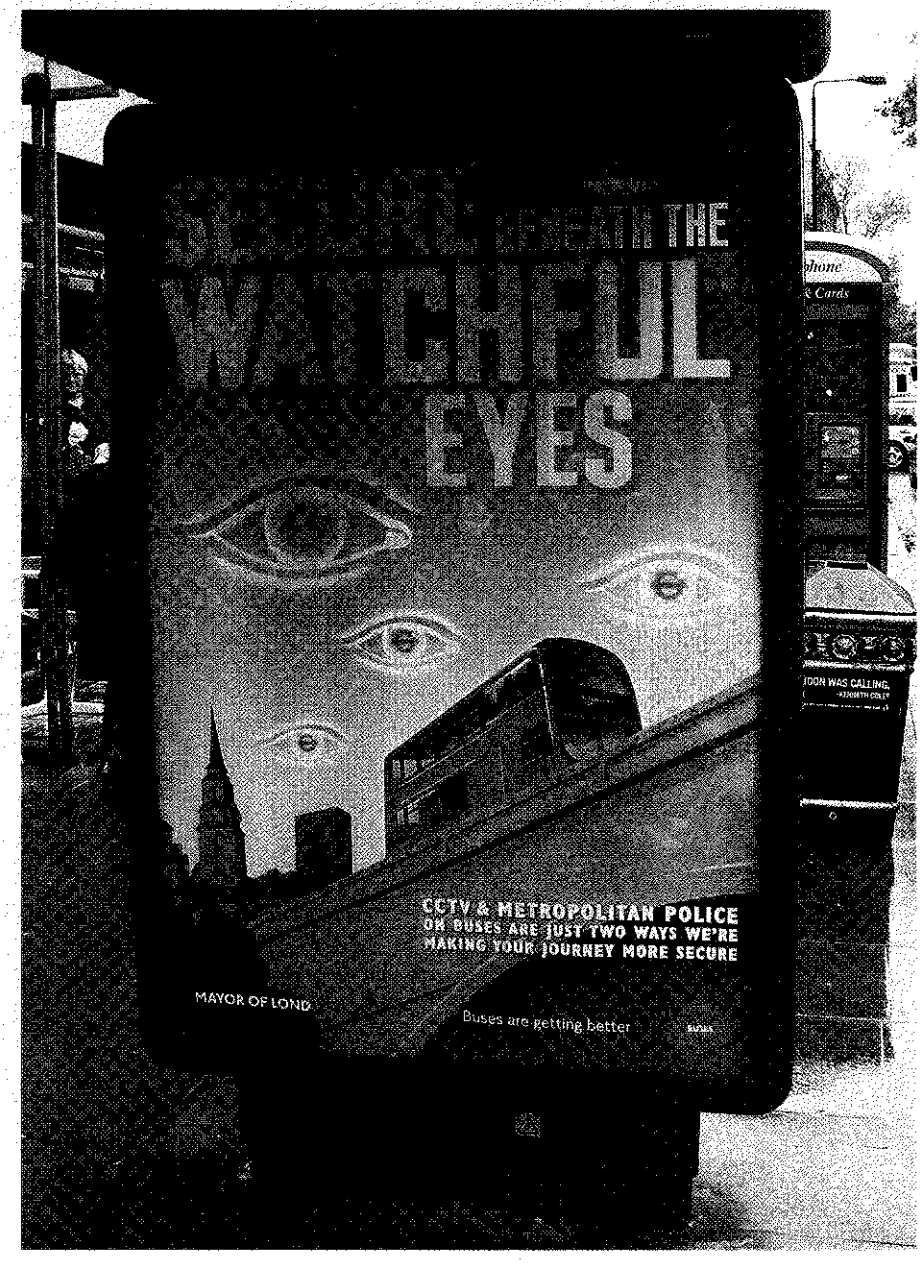
News From Airstrip One

Charles Paul Freund

THESE ASTONISHING POSTERS first graced London in October; this one was photographed by blogger Perry de Havilland of Samizdata.net. Although some Londoners originally perceived the posters as a clever protest against the state's intrusion into citizens' privacy (Brits are among the world's most closely monitored people), the unhappy truth is that the images are just what they seem. They are a *celebration* of intrusion, via supposedly all-seeing surveillance cameras on London's buses, in the guise of increased security.

Not only is the campaign's message Orwellian, according to critics, but so is its retro style. The posters' antique Modernism may have been intended to evoke positive memories of a stalwart and determined Churchillian Britain. During World War II, London was plastered with similar-looking graphic messages from the Ministry of Information.

But while Britain's wartime posters were calls to action and courage, this imagery calls for the acceptance of and submission to power. Its dated look thus evokes a graphic language not of wartime but of the mid-century idea of the benevolent power. That threatening concept was indeed Orwell's target. As Samizdata.net reader Peter Schiavo posted, "I know what they're powering the cameras with. They hooked a turbine to Orwell's spinning corpse." ▯



Perry de Havilland, www.samizdata.net

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A Label We Don't Need

Henry I. Miller is a search fellow at the Hoover Institution.

If you were designing a label to inform consumers that, for safety reasons, certain foods need to be cooked or handled in a certain way, what would it say? How about "Made in Brussels"?

No way, ridiculous and irrelevant, you say. Right on all counts. But that is tantamount to what the European Commission and parliament have decided to require for foods derived from organisms that have been genetically improved with the most precise gene-splicing techniques. This is public policy that puts politics and groundless fears ahead of science and common sense, and into conflict with more rational U.S. regulations.

Product labeling that conveys essential information is important, but compulsory labeling of gene-spliced foods is a bad idea for several reasons. First, it implies risks for which there is no evidence. Second, it flies in the face of worldwide scientific consensus about the appropriate basis of regulation—that it should focus on palpable risks, not the use of certain techniques. Third, it will push the costs of product development into the stratosphere. And fourth, the requirement constitutes a punitive tax on a superior technology.

The European Union (EU) is implementing labeling requirements for biotechnology that are more appropriate to potentially dangerous prescription drugs or explosives than to long-shelf-life tomatoes and disease-resistant potatoes.

Those who advocate mandatory labeling for genetically altered foods invoke consumers' "right to know." Just inform them what is in their breakfast cereal and let them make their own choices, goes the argument. But experience argues otherwise: The United Kingdom's mandatory labeling law has had the opposite effect. It sparked a stampede by food producers, retailers, and restaurant chains to rid their products of all gene-spliced ingredients so they wouldn't have to introduce new "warning" labels and risk losing sales.

A broad scientific consensus holds that modern techniques of genetic modification are an improvement on the kinds of genetic modification that has long been used to enhance plants, microorganisms, and animals for food. Because of the precision and predictability of the technology, the products of the newest techniques are even more predictable than—and at least as safe as—the genetically improved foods that have long enriched our diets, such as sweet corn and high yield grains.

Following long-standing precedents in food regulation, the FDA requires labeling if any new food raises questions of safety, nutrition, or proper usage. There is, however, no requirement for disclosure of the use of particular techniques to make food.

The European-mandated need to segregate gene-spliced foods will raise production costs and pose a particular disadvantage to products in this competitive market with low profit margins. To maintain the accuracy of labels, gene-spliced fruits, vegetables, and grains will have to be segregated through all phases of production—planting, harvesting, processing and distribution—adding costs and compromising economies of scale.

If enough people want to avoid gene-spliced food, niche markets will arise without a government mandate, as they have for organic and kosher products. For the present, it appears that the EU's regulations on labeling deserve a label of their own: unscientific and anti-consumer.

— Henry I. Miller

Paid for by the Hoover Institution, Stanford University

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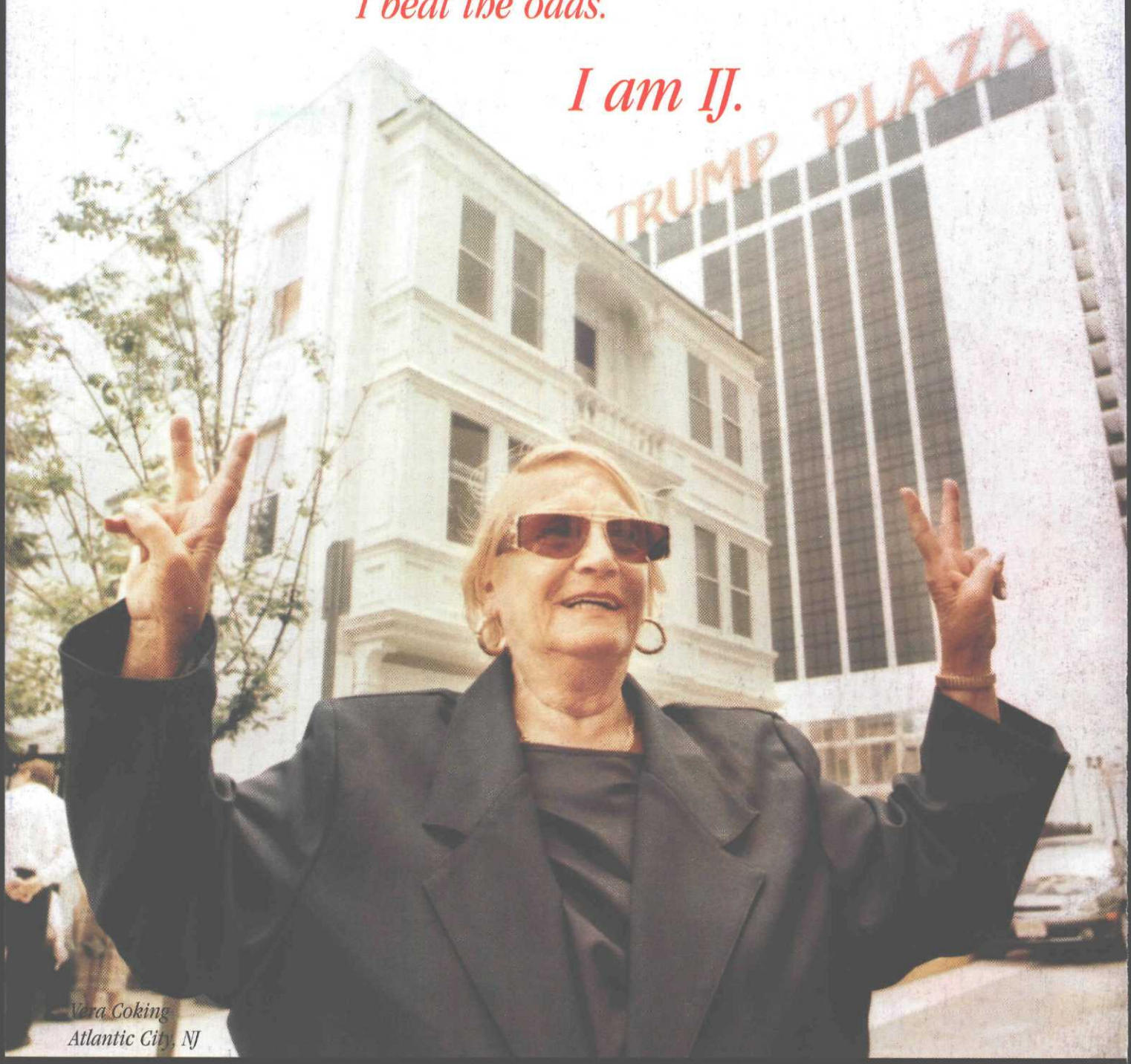
The government tried to seize my home
so it could give it to a casino for private use.

In a town where the odds are stacked against you,
I forced the hand of Atlantic City and Donald Trump.

I kept my home.

I beat the odds.

I am IJ.



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